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No. 14521

United States
Court of Appeals
for the Ninth Circuit

PANTHER OIL & GREASE MANUFACTUR-
ING COMPANY, a Corporation,
Appellant,
vs.

JOHN NORMAN SEGERSTROM, as adminis-
trator of the Estate of H. N. Segerstrom, de-
ceased,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

DEC 24 1951

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Spokane, Washington,

Attorneys for Appellee.

In the District Court of the United States, Eastern
District of Washington, Northern Division

No. 1149

JOHN NORMAN SEGERSTROM, as Administra-
tor of the Estate of H. N. SEGERSTROM, De-
ceased, Plaintiff,

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING CO., a Texas corporation,
Defendant.

PETITION FOR REMOVAL

To the United States District Court for the Eastern
District of Washington, Northern Division:

Comes now Panther Oil & Grease Manufacturing
Co., a Texas corporation, defendant in the above
cause, and file this its Petition for Removal of this
cause from the Superior Court of the State of
Washington in and for the County of Spokane, in
which it is now pending, to the District Court of
the United States for the Eastern District of Wash-
ington, in the Northern Division, in the City of
Spokane, in said District and State, and show to
the court the following facts:

I.

That this cause was commenced in the above de-
scribed Superior Court of the State of Washington,
in Spokane County, on about the 5th day of Octo-
ber 1953, in that a claimed service of process was
made on the petitioner on, to-wit, October 5, 1953,

and that a copy of plaintiff's complaint setting forth the claim of relief upon which the action was based, was first received by the petitioner on the 7th day of October 1953. That said Complaint [1*] has not been filed in said Superior Court at the time of filing this petition.

II.

That this action is one of a civil nature over which the district courts of the United States have original jurisdiction, the said action having been brought by the plaintiff against the defendant to recover damages for alleged breach of express warranty or alleged breach of implied warranty in the use of certain products and materials sold by the petitioner to the plaintiff, which it is claimed and alleged was not fit for the purpose intended, which product, it is claimed, was inflammable and explosive and that the plaintiff was not warned thereof.

III.

The matter in dispute exceeds the sum of \$3,000.00, exclusive of interest and costs, the suit being for the sum of \$361,000.00, as will more fully appear from the Summons and Complaint, a copy of which is hereto attached, marked Exhibit "A" and is hereby referred to and made a part hereof.

IV.

That at the time of the commencement of this action and ever since that time, the plaintiff was and is now a citizen and resident of the State of

* Page numbers appearing at foot of page of original Transcript of Record.

Washington and of the County of Spokane in said state, and the said defendant, Panther Oil & Grease Manufacturing Co., was and still is a corporation incorporated and existing under and by virtue of the laws of the State of Texas, with its principal office at Fort Worth in said State, and is now and was a citizen of said state, and that the said defendant and petitioner is not now, nor was not at the time of the institution of the action, and has not at any time been a resident of the State of Washington, or citizen thereof. [2]

V.

That the said defendant files herein and herewith a good and sufficient bond with good and sufficient sureties, for paying all costs and disbursements that might be incurred by reason of the transfer of these proceedings to this court, if this court should hold that the action was not removable or improperly removed thereto, as provided by the statutes of the United States.

Wherefore, your petitioner prays for the removal of the above entitled cause from the said State Court to this court.

Dated this 23rd day of October 1953.

/s/ PAINE, LOWE & COFFIN,

/s/ GRAVES, KIZER & GRAVES,

Attorneys for Petitioner

Of Counsel: Signed R. E. Lowe, J. W. [Illegible].

Duly Verified. [3]

[Endorsed]: Filed October 23, 1953.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents: That we, Panther Oil & Grease Manufacturing Co., a corporation, as principal, and Maryland Casualty Company, as surety, authorized to become sole surety on judicial bonds in the State of Washington, and in this court, are held and firmly bound unto John Norman Segerstrom, as Administrator of the Estate of H. N. Segerstrom, deceased, plaintiff in the above entitled action, in the just and full sum of Five Hundred Dollars (\$500.00), lawful money of the United States, well and truly to be paid.

This bond is conditioned nevertheless, that whereas the said plaintiff has commenced the above entitled action in the Superior Court of the State of Washington, in and for the County of Spokane, and said defendant has filed in the said District Court its Petition for Removal of said cause to the District Court of the United States, for the Eastern District of Washington.

Now Therefore, if petitioner-defendant, Panther Oil & Grease Manufacturing Co., a corporation, shall pay all costs and disbursements incurred by reason of the removal proceedings, if it should be determined that the cause was not removable or was [10] improperly removed to the District Court, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, we, the principal and

surety, have caused this instrument to be executed and our hands and seals affixed this 23rd day of October, 1953.

PANTHER OIL & GREASE MANUFACTURING CO., a corporation,

/s/ By R. E. LOWE,
Its Agent and Attorney,
Principal

[Seal] MARYLAND CASUALTY COMPANY, a corporation,

/s/ By KATHRYN HOWLAND,
Its Attorney in Fact [11]

[Endorsed]: Filed October 23, 1953.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains of defendant and alleges:

I.

At all times herein mentioned, defendant was and now is a corporation organized and existing under the laws of the State of Texas, and at all times herein mentioned has been doing business and now is doing business within the State of Washington, and is now subject to the jurisdiction of the Courts of this state.

At all times herein mentioned, defendant, among other things, manufactured and sold certain roofing materials known as "Battleship roof coating" and

“Battleship roofing primer.” At all times herein mentioned, one C. E. Brynildson was an agent and employee of defendant, duly authorized by defendant to sell the aforesaid products for defendant and to make the representations hereinafter mentioned for the purpose of furthering the sale of defendant’s products, and said C. E. Brynildson was, as to the matters hereinafter mentioned, at all times acting within the scope of his authority and for the use and benefit of defendant.

II.

At all times herein mentioned, the plaintiff John Norman Segerstrom was and now is the duly appointed, qualified and acting [12] Administrator of the Estate of H. N. Segerstrom, Deceased, by virtue of Letters of Administration issued to him out of the Superior Court of the State of Washington in and for the County of Spokane, in Probate Cause No. 47366 therein. At all times herein mentioned said estate and plaintiff as Administrator of said estate owned a large concrete cold storage warehouse building and two adjacent frame warehouse buildings, situated in Spokane County, State of Washington, and also owned a large quantity of stock and equipment contained in said warehouses.

III.

On or about the 24th day of March, 1953, the said C. E. Brynildson approached plaintiff for the purpose of endeavoring to sell plaintiff a quantity of the aforesaid roofing products to be used for the re-

roofing of the aforesaid warehouse buildings. The said C. E. Brynildson then and there, for the purpose of influencing plaintiff to purchase said products, warranted that said products were safe and could be safely applied by plaintiff's unskilled employees, and plaintiff, acting upon and relying upon said warranty, and also acting upon and relying upon defendant's implied warranty that said products were safe and fit for the purpose for which they were intended, purchased from defendant at said time a quantity of said Battleship roof primer and a quantity of said Battleship roof coating.

IV.

On or about the 8th day of July, 1953, plaintiff's employees were engaged in using some of the aforesaid Battleship roof primer on plaintiff's said warehouse buildings and on said date, while plaintiff and his said employees were using due care, the said Battleship roof primer violently exploded and ignited, setting fire to plaintiff's said warehouse buildings, which said fire substantially destroyed said buildings and the entire quantity of stock and equipment contained in said buildings as aforesaid. [13] That the said explosion of said Battleship roof primer and the fire which substantially destroyed plaintiff's property as aforesaid was proximately caused by negligence and carelessness of the defendant in that the said Battleship roof primer was a highly inflammable and explosive material, and the defendant knew or should have known of that fact and wholly failed, through labeling the

containers of said material or otherwise, to warn plaintiff and plaintiff's employees of the aforesaid explosive and inflammable nature of said material. The aforesaid explosion and fire which destroyed the plaintiff's said property also proximately resulted from the breach by defendant of the aforesaid express and implied warranties that the said Battleship roof primer was safe and could be applied by unskilled workmen, in that the said material was not in fact safe, but highly explosive, inflammable and dangerous, a fact which was then wholly unknown to plaintiff and plaintiff's said employees.

V.

Plaintiff, within a reasonable time following the aforesaid fire, and immediately upon plaintiff becoming aware of the aforesaid dangerous, explosive and inflammable character of the said Battleship roof primer, gave defendant notice in writing of the aforesaid breaches of warranty and of plaintiff's intention to hold defendant liable for plaintiff's damage occasioned thereby.

VI.

Plaintiff's said warehouse buildings, immediately prior to the aforesaid fire, had a reasonable and fair value of \$233,000.00, and immediately following said fire, and by reason of the damage to said buildings in said fire, said buildings had a reasonable and fair value of only \$20,000.00, to plaintiff's damage, through the negligence and breach of war-

warranties by the defendant as aforesaid, in the sum of \$213,000.00. [14]

VII.

The aforesaid stock and equipment owned by plaintiff and the estate of H. N. Segerstrom, Deceased, which was contained in the said buildings at the time of the said fire, had at the time of the said fire a reasonable and fair value of \$148,000.00, and the said stock and equipment were in said fire wholly destroyed and rendered valueless, and plaintiff and the estate of H. N. Segerstrom, Deceased, have thereby suffered damage through the negligence and breach of warranties of the defendant as aforesaid in the further sum of \$148,000.00.

VIII.

That at the time of the aforesaid fire and destruction of plaintiff's warehouse buildings, plaintiff owned and operated large orchard properties and had a large apple crop maturing on said properties, and by reason of the destruction of plaintiff's warehouse and cold storage buildings, plaintiff was faced with the immediate necessity of obtaining cold storage and packing facilities in order to avoid the loss of the said apple crop through inability to process and store same. Plaintiff therefore and in mitigation of plaintiff's damages undertook the immediate reconstruction of the cold storage building destroyed in said fire and acquired the only available warehouse and packing plant facilities sufficiently near plaintiff's properties, and by these steps plaintiff was able to store and pack the apple crop which

was then maturing as aforesaid. In so mitigating his damages, plaintiff, however, did necessarily incur expense in packing and storing said crop beyond that which would have been incurred but for said fire, in the following particulars: [15]

Additional cost of storing 12,000 boxes of apples at Yakima, Washington due to the inadequacy of the facilities available adjacent to plaintiff's properties	\$1,800.00
Transportation and shipping costs of said 12,000 boxes of apples	622.25
Rental value, including rentals actually paid, as to warehouse facilities destroyed which could not be replaced within the necessary time to handle the apple crop then maturing.....	5,000.00
Extra expense incurred transporting crop between East Farms cold storage plant and warehouse facilities acquired subsequently to fire.....	7,500.00

to plaintiff's further damage through the negligence of defendant as aforesaid in the sum of \$15,022.25.

Wherefore, plaintiff prays that he and the Estate of H. N. Segerstrom, Deceased, may have and recover from the defendant the sum of \$376,022.25, together with plaintiff's costs and disbursements herein, and for such other and further relief as may be proper.

CASHATT & WILLIAMS,
MALOTT, DELLWO & RUDOLF,
/s/ By JEROME WILLIAMS,
Attorneys for Plaintiff

Acknowledgment of Service attached. [16]

[Endorsed]: Filed February 16, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED COMPLAINT

Comes now the defendant and for Amended Answer to the Amended Complaint, admits, denies and alleges as follows:

I.

Admits the defendant at all times in the Amended Complaint mentioned, and now is, a corporation organized under the laws of the State of Texas, but denies that this defendant was at all times mentioned and had been prior to the commencement of this action, and is now, doing business in the State of Washington, and denies it is now subject to the jurisdiction of the courts of this state.

Admits that at all times in the Amended Complaint mentioned, defendant, among other things, sold certain roofing materials known as "Battleship roof coating" and "Battleship roofing primer". Admits that at all times in the Amended Complaint mentioned, one C. E. Brynildson was an agent of the defendant to sell the aforesaid products, and denies each and every other allegation, matter and thing alleged in the said paragraph I of the Amended Complaint. [17]

II.

Admits that at all times in the Amended Complaint mentioned the plaintiff, John Norman Segerstrom, was and now is the duly appointed, qualified

and acting Administrator of the Estate of H. N. Segerstrom, deceased; this defendant denies each and every other allegation, matter and thing contained in paragraph II of said Amended Complaint.

III.

Admits that prior to the 24th day of March 1953, said C. E. Brynildson approached plaintiff for the purpose of endeavoring to sell plaintiff a quantity of roofing products to be used for re-roofing the said warehouse buildings, and admits that John Norman Segerstrom did order from the defendant a quantity of Battleship roof primer and a quantity of Battleship Roof coating, and this defendant denies each and every other allegation, matter and thing alleged in paragraph III of said Amended Complaint.

IV.

Admits that on or about the 8th day of July 1953, certain warehouse buildings caught fire, and admits that the containers of material which were shipped to John Norman Segerstrom contained no express warning, and this defendant denies each and every other allegation, matter and thing alleged in paragraph IV of said Amended Complaint.

V.

This defendant admits that it received a letter from the plaintiff making certain claims, and denies each and every other allegation, matter and thing contained in paragraph V of said Amended Complaint. [18]

VI.

Denies all the allegations of paragraph VI and having no information as to the buildings alleged to be destroyed this defendant denies that they had any particular value, as alleged in the Amended Complaint, or otherwise.

VII.

This defendant having no information sufficient to form a belief as to the truth of the allegations of paragraph VII, and that the said stock and equipment had the value as alleged in paragraph VII, or any other value, denies the allegations of paragraph VII.

VIII.

This defendant having no information sufficient to form a belief as to the truth of the allegations of paragraph VIII of the Amended Complaint, or the expense incurred, as alleged in paragraph VIII, or the reasonable value of such expense, if any was incurred, denies the allegations of paragraph VIII, and each and every allegation, matter and thing therein contained.

For a Further, Separate and Affirmative Defense
This Defendant Alleges:

I.

That if there was any negligence on the part of this defendant, the plaintiff and his agents were guilty of negligence proximately contributing to any injuries or damage sustained by the plaintiff.

For a Second Separate Affirmative Defense, This Defendant Alleges:

I.

That the plaintiff was furnished an instruction pamphlet for the use of "Battleship", but did not follow the same and did not communicate the same to the employees who were given the duty of applying the "Battleship" primer.

For a Third Separate Affirmative Defense This Defendant Alleges:

I.

The employees of the defendant in the course of their duty in applying "Battleship" primer, placed the same in open containers over an open fire and caused it to be heated, all within a combustible wooden building, knowing at the time that said action was dangerous and that there was danger of fire, and that this action on their part materially contributed to and was a proximate cause of any fire which damaged the plaintiff's property.

For a Fourth Separate Affirmative Defense This Defendant Alleges:

I.

That the merchandise referred to in the Amended Complaint was sold pursuant to a written contract consisting of an order signed by John N. Segerstrom, which order was on or about the 23rd day of March 1953, accepted by said defendant and such order provided among other things: [20]

"This non-cancellable order is the entire agree-

ment and no conditions or agreements exist not shown on the original copy of order. No verbal statements or agreement shall vary any part of this written agreement, nor shall any be binding on company or buyer. Buyer agrees that Company makes no representations or warranties either express or implied not shown on this order, and that Company is not responsible for resale or application of these products purchased, or for any detriments resulting from or after application. Anyone who applies or supervises the application of these products does so as agent of the Buyer only."

Wherefore defendant prays that plaintiff take nothing and that it have its costs.

PAUL H. GRAVES,
Attorney for Defendant
GRAVES, KIZER & GRAVES,
Of Counsel

/s/ R. E. LOWE,
PAINE, LOWE, COFFIN, ENNIS
& HERMAN, Of Counsel

Acknowledgment of Service attached. [21]

[Endorsed]: Filed March 23, 1954.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

This matter was before the Court for pre-trial conference on March 5, 1954, pursuant to an order

issued under Rule 16 of the Federal Rules of Civil Procedure. Leo N. Cashatt, Jerome Williams and Kermit Rudolf appeared as attorneys for the plaintiff, and Roy E. Lowe and Paul H. Graves appeared as attorneys for the defendant. The following stipulations were had between counsel as to exhibits:

Plaintiff's Exhibits 1 to 11, inclusive—Photographs. The identity and authenticity of the photographs is admitted, but defendant reserved all other objections until the time of trial.

Defendant's Exhibit 12—Order blank. It is stipulated that the document was signed by John N. Segerstrom and that it may be admitted in evidence without objection.

Plaintiff's Exhibit 13—Blank form of order blank. It is stipulated that it may be admitted in evidence without objection, and it is stipulated that in the ordinary course of business of the defendant this form would have been prepared as a carbon copy of Exhibit 12 and left in the possession of the customer. [22]

Plaintiff's Exhibit 14—Instruction book. It is stipulated that Exhibit 14 is the book of instructions referred to in Exhibits 12 and 13, and is the book of instructions furnished by plaintiff to defendant about the same time as the execution of Exhibit 12, and that it may be admitted in evidence without objection.

Plaintiff's Exhibit 15—Booklet. It is stipulated that this is a folder which was supplied to plaintiff by defendant about the time of execution of Ex-

hibit 12. All objections to the admissibility of this exhibit are reserved until the time of trial.

Plaintiff's Exhibit 16—Lease. It is stipulated that this is the lease of the real estate upon which the buildings and machinery referred to in the Complaint were situated at the time of the fire, and that it may be admitted without objection.

The following additional matters were stipulated between counsel:

I.

It Is Stipulated and Agreed by the defendant that this Court has jurisdiction over the parties and over the subject matter of the action.

II.

It Is Stipulated that the product referred to in the Complaint as Battleship Primer is made according to specifications, that it is a uniform product as shipped by defendant, and that all barrels of the Battleship Primer received by plaintiff by virtue of the order, Exhibit 12, were uniform as to contents when shipped by defendant. [23]

III.

It Is Stipulated that plaintiff will furnish to defendant samples of the portion of the Battleship Primer remaining in plaintiff's possession, for testing.

IV.

It Is Stipulated that plaintiff will make available to the defendant's accountant such books and records as plaintiff has concerning the business known

as Segerstrom Fruit Company, and defendant agrees to furnish plaintiff with a copy of its accountant's findings or summary.

Plaintiff's Contentions

Plaintiff's counsel at the conference made a statement of plaintiff's contentions with respect to the manner in which defendant's product caused the destruction of plaintiff's buildings and property, which statement is attached hereto and made a part hereof. In addition, plaintiff makes the following contentions:

I.

The defendant knew or should have known that the product, Battleship Primer, was inherently dangerous and was negligent in that it did not warn plaintiff in some way of the dangerous nature of the product, and that the defendant had under the circumstances a positive duty to warn purchasers, and that the destruction of plaintiff's property proximately resulted from defendant's negligence in this respect. [24]

II.

The defendant was negligent in that the product could not be applied without heating, and that fact was known or should have been known to defendant, and defendant further knew or should have known that such heating would render the material extremely dangerous and subject to explosion or ignition of gases volatilized from the material and that the destruction of plaintiff's property proxi-

mately resulted from defendant's negligence in this respect.

III.

That the sale of the product referred to was in violation of Revised Code of Washington 70.74.300, in that the containers were not labelled "explosive" as required by said statute.

IV.

Plaintiff withdraws his allegations and all claims or contentions as to breach of warranties, express or implied, and is now relying solely on the claim of negligence.

Defendant's Contentions

Defendant makes the following contentions:

I.

Battleship Primer is not inherently dangerous and the defendant neither knew nor could have known that it was inherently dangerous, but it is patently [25] and obviously a petroleum product. It is not an explosive.

II.

The order blank signed by the plaintiff, Exhibits 12 and 13, contains language which bars any reliance by plaintiff upon oral or other representations other than those contained in the said order blank and in the instruction pamphlet, Exhibit 14.

III.

Defendant gave plaintiff written instructions as

to how to use Battleship and if those instructions had been followed no fire would have occurred.

IV.

The employees of the plaintiff exposed the Primer in question to an open fire inside a wooden building, realizing that such action was dangerous, and this being done in the course of their regular employment, the plaintiff assumed the risk and hazard involved and he is responsible for their wanton acts or negligence and cannot recover.

It Is Ordered that all of the above stipulations be and the same are hereby approved, that the contentions of the respective parties as stated herein are not to be conclusive upon either of them, and that this pre-trial order supplements [26] the pleadings in this cause, and if there is any conflict between the order and the pleadings, this order shall govern.

Dated this 1st day of April, 1954.

/s/ SAM M. DRIVER,

United States District Judge

Agreed:

/s/ CASHATT & WILLIAMS,

Attorneys for Plaintiff

/s/ GRAVES, KIZER & GRAVES,

/s/ PAINE, LOWE & COFFIN,

Attorneys for Defendant

[27]

The Court All right, Mr. Williams when you are ready.

Mr. Williams: Well, then, just for clarification of the issues, your Honor, and not absolutely committing ourselves to the matter at this time, subject to possible revision——

The Court: Yes, that is understood.

Mr. Williams: ——we felt that we would like to say that our position as to how this material touched off these buildings is about this:

That this material, this primer, was, in fact, a highly volatile substance, with certain fractions in it substantially the same as gasoline, and volatilizing or subject to volatilizing, that is, gasefying, the surrounding air at temperatures at least as low as 60 degrees Fahrenheit, so that at normal outdoor temperatures, particularly on the day in question when the temperature was 90 or in excess of 90 degrees, this material was volatile, was subject to and was volatilizing, so as to create a condition where any spark, whether from a match or cigarette or what-not, was liable to set the material off and it would cause an explosion or what would amount to an explosion.

In that connection, as to an explosion, the particular conditions here did not cause a violent explosion, but rather what a scientist would call a somewhat slow explosion, or maybe you could call it a flash fire. The material itself would not burn, but the volatilized fractions of it volatilizing into the surrounding air were touched off and caused this flash fire or mild explosion which immediately then destroyed the buildings.

Our position is—I think we made it clear in the

complaint—that the nature of the material was such that it was highly dangerous by reason of this highly volatile nature of these fractions and such that the manufacturer had [28]an absolute duty to warn the purchasers or others liable to come in contact with the material of its inflammable and explosive nature, and that was not done, and that, in fact, it formed something of a trap, as I said before, because the material otherwise was of an inferior quality, so that, contrary to what the manufacturer by the order and the instructions led one to believe, the material could not be applied cold. In other words, it was simply too thick and viscous to permit it to flow at all and it required some heating in order to put it in a condition where it could be applied, and in that sense it formed a trap. Of course, heating, necessarily, a volatile substance makes it volatilize all the more rapidly and further enhanced the dangerous nature of the condition; but that notwithstanding, even if it had not been heated at all, it was liable to do just exactly what happened; that the substance was such that it was volatilizing in the atmosphere at the air temperature at that time even without the heat.

I think that covers it.

The Court: Your theory, then, is, I take it, that this was an inherently dangerous substance that placed a special burden on the manufacturer and seller?

Mr. Williams: The manufacturer, certainly.

The Court: Well, in this case the manufacturer was the seller.

Mr. Williams: That's right.

The Court: I say, the manufacturer, who was in this instance the seller; is that your position?

Mr. Williams: Yes. [29]

[Endorsed]: Filed April 1, 1954.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS

If the court denies defendant's motion for an instructed verdict, and for dismissal, the defendant then requests that the following special instructions be given to the jury: [2061]

Instruction No. 1

You are instructed that the plaintiff has the burden of proving his case, both as to liability and as to damages. This means that the burden rests upon the plaintiff to prove such issues by a fair preponderance of the evidence; that is, by the greater weight or better evidence. [2062]

Instruction No. 2

Before the defendant can be held liable in damages, you must find from a fair preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of plaintiff's injuries. [2063]

Instruction No. 3

Foresight not retrospect is the standard of diligence. It is nearly always easy after an accident has happened to see how it could have been avoided, but negligence is not a matter to be charged after the occurrence. There is always a question of what reasonably prudent men under the same circumstances would, or should, in the exercise of reasonable care, have anticipated.

Instruction No. 4

You are instructed that the foreman and other employees of the plaintiff Segerstrom, when in the performance of their regularly assigned duties, were agents of the plaintiff in performing such acts, and any negligence of them or any of them was negligence of the plaintiff, and if such negligence was a contributing cause of damage to plaintiff's property, then the plaintiff cannot recover. [2065]

Instruction No. 5

You are instructed that the Battleship roofing primer is not an explosive, as that definition is known to the law, and in your deliberations you should not consider it as an explosive. [2066]

Instruction No. 6

In order for the plaintiff to recover against defendant in this case he must show by a preponderance of the evidence that the defendant had knowledge of a danger, not merely a possible danger but a probable danger, that the material would be

handled by the plaintiff in the way it was handled and that damage to plaintiff's property would result, before the plaintiff is entitled to recover. If you find that the defendant could not reasonably anticipate such probable danger, then your verdict should be for the defendant. [2067]

Instruction No. 7

Where an article is not inherently dangerous but becomes dangerous only because of some act of the plaintiff, then the defendant is not liable to the plaintiff for consequences which result therefrom.

Instruction No. 8

If you find from the evidence that the Battleship primer became dangerous in this case only because of being heated in the manner in which it was heated and that the plaintiff had been warned against heating Battleship, then your verdict should be for the defendant. [2069]

Instruction No. 9

If you find from a preponderance of the evidence that the Battleship product sold to the plaintiff was a standard and common commodity, and that there is no inherent danger in the product as manufactured, which the defendant knew or ought to know would probably produce the injury complained of and in the manner in which it was received, when handled by a person of ordinary knowledge and prudence, then your verdict should be for the defendant. [2070]

Instruction No. 10

You are instructed that generally speaking all persons must exercise reasonable care for their own safety. Therefore, if you find from the evidence that there was a danger in placing the Battleship over an open flame in an inclosed room, and that plaintiff's employees in performance of their assigned duties were aware or in the exercise of reasonable care should have been aware of such danger, then the defendant was not required to give warning of the danger. [2071]

Instruction No. 11

A manufacturer is not bound to anticipate that a product will be used other than in the manner intended, and if you find from the evidence that a reasonably prudent person would not, under the circumstances, place the material referred to in the Complaint on an open fire and within a room such as the room described by the plaintiff's witnesses, then you should return a verdict for the defendant.

Instruction No. 12

If you find from the evidence that the defendant over a long period of time had sold the product in question prior to the time of the sale to the plaintiff, and that in their experience no accident had ever happened through customers attempting to heat the same, then the defendant had a right to assume that in their method of instructing their customers it was exercising due care under the circumstances

and that no warning other than instructions given was necessary. [2073]

Instruction No. 13

You are instructed that it was the duty of the plaintiff, John Norman Segerstrom, to read the instruction book furnished him by the defendant and to follow those instructions, and to pass the information on to the employees charged with using the Battleship product. If you find from the evidence that his failure to do this was a contributing cause of the fire and ensuing damage to his property, then your verdict should be for the defendant. [2074]

Instruction No. 14

You are instructed that the measure of damages is that indemnity which will afford adequate compensation to a person for the loss suffered by him as the direct, natural and proximate consequence of the injury he has sustained. [2075]

Instruction No. 15

You are instructed that damages mean compensation for loss suffered or injury sustained. Damages must be based upon something more substantial than guess, assumption or speculation. The plaintiff must prove that loss was suffered or injury was sustained and the amount thereof by a fair preponderance of the evidence. [2076]

Instruction No. 16

If you find for the plaintiff it will be your duty to award him damages and these should be in such amount as to reasonably compensate him for the loss actually sustained.

The evidence of experts as to the value of any property is not binding upon you, but you will judge the weight and force of that evidence by your own general knowledge of the subject of the inquiry.

You will take into consideration the age and condition of the respective buildings, or parts of the building, and the age and condition of machinery and other personal property, as well as other relative evidence, in considering its value.

If you find from the evidence that the plaintiff is entitled to recover for his additional expense incurred in handling his apple crop for the year 1953, you may include in damages only those amounts which he necessarily incurred because of the destruction of his packing plant, warehouse and refrigeration building by fire, and in connection with repairs to any other building, you should consider only such amounts as were reasonably incurred for the purpose of putting them in useable condition until the burned property could be replaced. In that connection, it was the duty of the plaintiff to use reasonable diligence to rebuild the buildings, if he planned on rebuilding them rather than making permanent improvements to other buildings, if you find from the evidence they could have been used temporarily without such permanent improvements. [2077]

Instruction No. 17

You are instructed that if you find that the plaintiff is entitled to recover from the defendant, then in that event, in determining the amount of damage or loss, if any, that plaintiff has sustained with respect to his buildings, you are to find and allow only such sum as you believe from the evidence is the fair and reasonable value of the destroyed portion of each building. In determining such sum, if any, you should consider its cost, age, condition, location, and uses to which it had been put, to the extent that plaintiff will be placed as nearly as possible in the same position, no better or no worse, than he was immediately before the fire. [2078]

Instruction No. 18

You are instructed that if you believe from the evidence that the structures used by plaintiff in his business prior to the fire were in fact separate buildings, although used for a joint or common purpose, you should consider and assess the damages, if any, to each building separately in accordance with the instructions for measuring such damages that have been given you. [2079]

Instruction No. 19

You are instructed that in the event you should find from the evidence that the plaintiff is entitled to recover of the defendant, it will be your duty to determine the amount of damage or loss you may believe from the evidence that the plaintiff has sustained; and in determining such loss, if any, with

respect to plaintiff's personal property, that is, the machinery, tools, equipment, and supplies, you are to find and allow only such sum as you believe from the evidence was the fair cash market value of such property destroyed by fire on July 8, 1953; provided, such article or thing had a market value.

Instruction No. 20

You are instructed that if you find that the plaintiff is entitled to recover of the defendant, then in considering the amount of damages, if any, to be awarded plaintiff, you will take into consideration in addition to the other elements for determining questions that have been given you, the value, if any, that plaintiff placed on any of his property at previous times, if you find that he was called upon to place such value thereon at any time.

Instruction No. 21

You are instructed that if you believe from the evidence that it was reasonably possible for plaintiff to restore his buildings to adequate use in processing his 1953 apple crop, without equipping another building for such purpose, then you should not consider the expenses of equipping such additional building in determining the amount of damages, if any, to be allowed plaintiff. [2082]

Instruction No. 22

The fact that the court has instructed you upon the rule governing the measure of damages is not to be taken by you as an indication on the part of

this court, either that it believes or does not believe that the plaintiff is entitled to recover damages. Such instructions are given to guide you in the amount of your verdict, if you find that plaintiff is entitled to recover damages against the defendant.

Instruction No. 23

You are instructed that in this case the plaintiff is suing to recover for claimed negligence of the defendant, the basis of the complaint being that the defendant sold to the plaintiff a dangerous product without warning him of the danger. In that connection, there has been certain evidence offered of statements made by the salesman at the time it was purchased and written statements concerning the qualities of the Battleship product. You will pay no attention to either evidence of statements of the witnesses as to the product or to any printed statements representing the product, as the only ground on which the plaintiff is entitled to recover is that, as stated before, the defendant sold a dangerous commodity to plaintiff without warning the plaintiff of the danger. [2084]

[Endorsed]: Filed May 4, 1954.

Instruction No. 24

I instruct you that the Department of Labor and Industries of the State of Washington has authority to promulgate safety rules and regulations designed to protect the workingmen of this state. Pursuant to that authority it has adopted rules, and these

rules were in effect July 8, 1953, which provide (1) that all open tar heating pots must be kept outside of buildings at all times, with certain exceptions that do not apply to the situation before you, (2) that if tar is being applied inside an enclosure (as contrasted with heating inside an enclosure) exhaust fans must be used to supplement the building's ventilation, (3) that while tar is being cooked an attendant must be present at the pot at all times and (4) that there shall be available some means to smother the fire at fired tar pots at all times. I further instruct you that these rules have no direct application to the work being done by the plaintiff's employees July 8, 1953, but that they may be considered by you, together with all other facts and circumstances which have been proven to your satisfaction, as showing a standard of care adopted by competent authority to govern the heating of tar roofing applications. [2085]

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find for the Plaintiff in the sum of \$111,035.00.

/s/ R. O. ALLEN,

Foreman

[2086]

[Endorsed]: Filed May 8, 1954.

In the United States District Court of the Eastern
District of Washington, Northern Division

No. 1149

JOHN NORMAN SEGERSTROM, as Administra-
tor of the Estate of H. N. Segerstrom, De-
ceased, Plaintiff,

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING CO., a Texas corporation, Defendant.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver, presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 8th day of May, 1954, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of \$111,035.00.

It Is Ordered and Adjudged that the plaintiff recover of the defendant the sum of \$111,035.00 and his costs of action.

Dated at Spokane, Washington, this 10th day of May, 1954.

/s/ STANLEY D. TAYLOR,

Clerk

[2087]

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR PARTIAL NEW TRIAL

The defendant, Panther Oil & Grease Manufacturing Co., moves the court to set aside the verdict returned in this case and to set aside the judgment against the defendant entered thereon, and to enter judgment for the defendant in accordance with its motion for directed verdict and based upon the same reasons.

Upon the ground:

The court should have granted defendant's motion for directed verdict at the close of all the evidence because the plaintiff's evidence was insufficient in law;

and all of the evidence is insufficient in law to form a basis for a verdict for the plaintiff.

If this motion for judgment is denied and not otherwise, then this defendant moves the court as to herein designated issues of law that a new trial be granted solely on the question of liability of the defendant to the plaintiff and for the following reasons:

1. That the verdict as to liability of defendant is contrary to law.
2. That the verdict as to liability of defendant is contrary to the evidence.
3. That the verdict as to liability of defendant is contrary to the law and the evidence.

4. That the verdict as to liability of defendant is contrary to the weight of the evidence. [2088]

5. There is no substantial evidence that the defendant was guilty of negligence which was a proximate cause of any injury to the plaintiff's property.

6. The evidence shows that the plaintiff was guilty of negligence which materially contributed to the damage to his property.

7. The court erred in denying defendant's motion for directed verdict in its favor at the close of plaintiff's case.

8. The court erred in denying defendant's motion for directed verdict in its favor at the close of all the evidence.

9. The court erred in denying defendant's motion for judgment notwithstanding the verdict.

10. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"You are instructed that, aside from any requirements of statutes, a manufacturer who puts up and sells a material which is inherently dangerous has a positive duty to give adequate warning of its dangerous character to the purchaser of such material, and the failure of such manufacturer to give such adequate warning is negligence rendering the manufacturer liable for any damages proximately resulting from such failure to warn."

11. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"You are therefore instructed that if you should

find from a preponderance of the evidence that the material sold by defendant to plaintiff was inherently dangerous, and that defendant failed to warn plaintiff of such danger as to the material, and the fire damage to plaintiff's property proximately resulted from such failure to warn, if any, then your verdict should be for the plaintiff, unless you find further from the preponderance of the evidence that the plaintiff was guilty of contributory negligence."

12. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"You are instructed that there is a statute of the State of Washington, Revised Code of Washington 70.74.300, which provides as follows: [2089]

"'A person who puts up for sale or who delivers to a warehouseman, dock, depot or common carrier, a package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word "explosive," shall be guilty of a misdemeanor.'

"You are instructed that a violation of the foregoing statute would constitute negligence."

13. The court erred in giving to the jury the following instruction over defendant's objection and exception:

"If you should find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to the

plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by that statute."

14. The court erred in instructing the jury over defendant's objection and subject to the defendant's exception that it should ignore any reference to the regulations of the Interstate Commerce Commission such regulations as to the labeling of flammable materials are concerned with the hazards connected with the shipment of such material in closed containers.

15. The court erred in instructing the jury over defendant's objection and defendant's exception that it was negligence for the defendant to send out, sell or give material of an inherently dangerous character even aside from the statute, Rem. Rev. Stat. 70.74.300.

16. The court erred in instructing the jury, in substance, over the defendant's objection and defendant's exception, that if the manufacturer does not intend to have his product used in a certain way, this will not relieve him from liability for damages to one attempting to so use it, if the manufacturer as an ordinary prudent person had reason to believe that it would be so used and from directions or instructions or information furnished by the manufacturer, a person of ordinary intelligence would conclude that it might safely be so used.

17. The court erred in receiving in evidence

plaintiff's Exhibits 77, 78, 79 and 80, for the reason that said testimony was not proper rebuttal and there was no showing as to said labels being used on or prior to July 9, 1953.

18. The court erred in refusing to give defendant's requested instruction No. 24, submitting to the jury for its consideration rules of the Department of Labor and Industries regarding the use of open tar heating pots, or otherwise submitting to the jury an instruction on said regulation of the Division of Safety, Department of Labor and Industries and the effect thereof.

May 17, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ By R. E. LOWE

GRAVES, KIZER & GRAVES,

/s/ By PAUL H. GRAVES,

Attorneys for Defendant

Acknowledgment of Service attached. [2091]

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

ORDER DENYING POST-TRIAL MOTIONS

This matter came on regularly for hearing before the undersigned Judge of the above-entitled Court on the 20th day of May, 1954, on the motion of plaintiff for a partial new trial on the issue of

damages only, and also upon the motions of the defendant for judgment notwithstanding the verdict of the jury or alternatively for a partial new trial on the issue of liability only, and plaintiff appearing by his attorneys, Cashatt & Williams and Malott, Dellwo and Rudolf, and the defendant appearing by its attorneys, Paine, Lowe & Coffin, Ennis & Herman and Graves, Kizer & Graves, and the Court having heard the arguments of both parties as to all of said motions, and being fully advised in the premises, Now, Therefore,

It Is Ordered that all of said motions be and the same are hereby denied, and the judgment heretofore entered upon the verdict of the jury in this case shall be of full force and effect. Both parties are allowed exceptions.

Approved, Clerk is directed to enter.

Done In Open Court this 14th day of June, 1954.

/s/ SAM M. DRIVER,

District Judge

[2092]

Presented by:

/s/ JEROME WILLIAMS,

Of Counsel for Plaintiff

Approved as to Form:

Paine, Lowe, Coffin, Ennis & Herman,
Graves, Kizer & Graves,

/s/ ALAN P. O'KELLY,

Attorneys for Defendant

[2093]

[Endorsed]: Filed June 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Panther Oil & Grease Manufacturing Co., a Texas Corporation, defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 10, 1954, and filed of record in the above entitled court on said date, and from each and every part thereof.

Dated this 23rd day of June, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

GRAVES, KIZER & GRAVES,

/s/ By ALAN P. O'KELLY,

Attorneys for Defendant [2094]

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND

Know All Men By These Presents:

That we, Panther Oil & Grease Manufacturing Co., a Texas corporation, as principal, and National Surety Corporation, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of

Washington, as surety, are held and firmly bound unto John Norman Segerstrom, as Administrator of the Estate of H. N. Segerstrom, deceased, in the just and full sum of \$130,000.00 to be paid to the said John Norman Segerstrom, as Administrator of the Estate of H. N. Segerstrom, deceased, his attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally by these presents.

Witness our hands and seals this 18th day of June 1954.

Whereas, lately in a suit pending in the United States District Court for the Eastern District of Washington, Northern Division, between the parties above named, a judgment was rendered against defendant above named and defendant having filed a notice [2095] of appeal to reverse the judgment on appeal to the United States Court of Appeals for the Ninth Circuit;

Now, the Condition of This Obligation Is Such that if the said Panther Oil & Grease Manufacturing Co., a Texas corporation, shall prosecute said appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if the appeal is dismissed, or if the judgment is affirmed and satisfy any modifications of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then the

above obligation to be void; else to remain in full force and effect.

[Seal] PANTHER OIL & GREASE MANUFACTURING CO.,

 /s/ By A. M. PATE,
 Exec. Vice President

Attest: /s/ GEO. BILLINGSLEY, Secretary

[Seal] NATIONAL SURETY CORPORATION,

 /s/ By L. W. PILKEY, Attorney-in-Fact

Countersigned: Jones & Mitchell Co., signed by
 L. W. Pilkey.

Approved this 18th day of June, 1954.

 Malott, Dellwo & Rudolph,
 Cashatt & Williams,

 /s/ Jerome Williams, Attorneys for Plaintiff.

Approved this 25th day of June, 1954.

 /s/ SAM M. DRIVER, Judge [2096]

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a Notice of Appeal was filed in the above entitled cause by the defendant on June 23, 1954, and upon oral motion of counsel for the defendant, it is hereby

Ordered that the time to file and docket the record on appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including September 21, 1954.

Dated this 26th day of July, 1954.

/s/ SAM M. DRIVER,
United States District Judge

[Endorsed]: Filed July 28, 1954. [2097]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

1. The testimony by Mr. McGivern, giving his opinion as to why manufacturer's labeled products, having a flash point of 150° or less is hearsay, speculative, not a subject of expert testimony and not admissible.

2. The respondent was adequately warned that the product furnished him by the appellant should not be heated.

3. The proximate cause of plaintiff's damage was the unanticipated conduct of plaintiff in placing the product over an open flame.

4. The respondent, through his employees, was aware of the danger of heating the product and was, therefore, negligent as a matter of law and assumed the hazards in heating.

5. The construction and application of the Revised Code of Washington, Section 70.74.300 was for the Court to determine and should not have been left to the Jury.

6. The Washington Statute RCW 70.74.300 does not intend to and does not apply to a commercial product such as the roof coating in question.

Dated this 3rd day of September, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ R. E. LOWE,

GRAVES, KIZER & GRAVES,

/s/ B. H. KIZER,

Attorneys for the Defendant

Acknowledgment of Service attached. [2098]

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The appellant hereby designates the following portions of the record to be filed in the Court of Appeals:

Amended Complaint.

Petition for Removal.

Bond on Removal.

Amended Answer to Amended Complaint.

Order on Pre-trial Conference.

Reporter's Transcript of Proceedings.

Reporter's Transcript of Proceedings reduced to Narrative Form.

Testimony (except that relating to amount of damage).

Motion for Dismissal or Directed Verdict at the end of Plaintiff's Case.

Motion for Directed Verdict at Conclusion of all Testimony.

Court's Oral Opinion on Motion for Directed Verdict.

Defendant's Requested Instructions.

Transcript of Court's Instructions.

Transcript of Defendant's Exceptions to Instructions.

Verdict.

Judgment.

Defendant's Motion for Judgment Notwithstanding the Verdict or for Partial New Trial.

Opinion on Motion for Judgment n.o.v. [2099]

Order Denying Post-Trial Motions.

Notice of Appeal.

Cost and Supersedeas Bond.

Order Extending Time to File and Docket Record.

This designation of record to be transmitted.

Dated this 3rd day of September, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ R. E. LOWE

GRAVES, KIZER & GRAVES,

/s/ B. H. KIZER,

Attorneys for Defendant [2100]

Acknowledgment of Service attached.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

In addition to the record heretofore designated to the Clerk of the above entitled court to be transmitted to the Court of Appeals, on appeal of this case, you will please transmit to the Clerk of said court the following exhibits:

Exhibit 12—Order of purchase.

Exhibit 13—Blank form of order.

Exhibit 14—Instruction pamphlet.

Exhibit 18—Instruction pamphlet.

Exhibit 19—Letter from defendant to plaintiff.

Exhibit 25—Specifications of primer.

Exhibit 27—Graph of tests.

Exhibit 46—Printed pamphlet of tar kettle.

Exhibit 49—Chart of temperatures.

Exhibit 50—Chart of temperatures. [2101]

Exhibit 57—Chemical standards of asphalt.

Exhibit 65—Record of sales.

Exhibit 66—Record of sales.

Exhibit 67—Computation of total sales.

Dated this 8th day of September, 1954.

GRAVES, KIZER & GRAVES,
/s/ PAUL H. GRAVES
PAINE, LOWE, COFFIN, ENNIS
& HERMAN,
/s/ R. E. LOWE,
Attorneys for Defendant

Acknowledgment of Service attached. [2102]

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD

Appellee hereby designates the following additional portions of the record to be transmitted to the Clerk of the Court of Appeals for the Ninth Circuit for filing in said Court:

Reporter's entire Question-and-Answer Transcript of Trial Proceedings.

The originals of the following Exhibits: 15, 20, 21, 23, 26, 47, 48.

This Designation.

Dated this 8th day of September, 1954.

CASHATT & WILLIAMS and
MALOTT, DELLWO & RUDOLF,
/s/ By JEROME WILLIAMS,
Attorneys for Plaintiff-Appellee

Acknowledgment of Service attached. [2103]

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION

In addition to the record heretofore designated by both parties to be transmitted to the Court of Appeals for the Ninth Circuit, would you please transmit the originals of all of the exhibits introduced in evidence on the trial of this case.

Dated this 10th day of September, 1954.

CASHATT & WILLIAMS and
MALOTT, DELLWO & RUDOLF,
/s/ By JEROME WILLIAMS,
Attorneys for Plaintiff-Appellee

Acknowledgment of Service attached. [2104]

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals on file in the above entitled cause:

Petition for Removal.

Bond on Removal.

Amended Complaint.

Amended Answer to Amended Complaint.

Order on Pre-Trial Conference.

Reporter's Narrative Form Record of Proceedings.

Reporter's Record of Proceedings (complete form).

Defendant's Requested Instructions.

Verdict.

Judgment on Jury Verdict.

Motion for Judgment Notwithstanding the Verdict or for Partial New Trial.

Order Denying Post-Trial Motions.

Notice of Appeal.

Cost and Supersedeas Bond.

Order (extending time to file and docket record on appeal).

Appellant's Statement of Points on Appeal.

Designation of Record to be Transmitted.

Supplemental Designation of Record to be Transmitted.

Appellee's Designation of Additional Portions of the Record to be Transmitted.

Appellee's Supplemental Designation.

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as set forth in the Appellant's Notice of Appeal filed June 23, 1954, and as called for by Appellant's Designation of Record, Supplemental Designation of Record, and Appellee's Designation of Additional Portions of Record and Supplemental Designation.

I further certify that all exhibits introduced and rejected at the trial, being exhibits numbered 1 to 80 inclusive, excepting numbers 29, 41 and 64, which were withdrawn, will be forwarded under separate cover to the Clerk, United States Court of Appeals, Post Office Building, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 15th day of September, A. D. 1954.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, United States District Court, Eastern District of Washington.

In the United States District Court for the Eastern
District of Washington, Northern Division

Civil No. 1149

JOHN NORMAN SEGERSTROM, as Adminis-
trator of the Estate of H. N. Segerstrom, De-
ceased, Plaintiff,

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING CO., a Texas Corporation, Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL
(In Narrative Form)

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, April 26, 1954, before the Honorable Sam M. Driver, Judge of the said Court, and a jury; the plaintiff being represented by Jerome Williams and Leo N. Cashatt of Cashatt & Williams, and Kermit M. Rudolf of Malott, Dellwo & Rudolf, his attorneys; the defendant being represented by Roy E. Lowe of Paine, Lowe, Coffin, Ennis & Herman, and Paul H. Graves of Graves, Kizer & Graves, its attorneys;

Whereupon, the following proceedings were had, to-wit: [33]

Spokane, Monday, April 26, 1954, 1:30 p.m.

Prior to the selection of a jury in the instant cause, the following proceedings were had in chambers:

Plaintiff was granted permission by the Court to call Mr. Segerstrom and Mr. Rosenbaum, his foreman, first on the liability phase of the case, and later on damages.

Plaintiff requested a ruling from the Court as to the admissibility of valuations of property contained in inheritance tax returns, advising the Court it was anticipated defendant might seek to introduce them as an admission against interest. The Court ruled the matter would be passed upon when it arose during the course of the trial.

Plaintiff was granted leave to file a trial amendment to the amended complaint alleging additional items of expense in mitigation of damages not to exceed \$15,500.

Upon motion of the defendant, Stipulation II of the Stipulations of Fact was amended to substitute the word "specification" for the word "formula."

In the absence of stipulation to the contrary, the Court ruled the verdict must be unanimous, and it was agreed an alternate juror should be selected. (T-2-12*)

Whereupon, a jury, together with one alternate, [34] was duly impaneled and sworn to try the cause; the Court gave cautionary instructions to the jury; and the cause was adjourned until 10 o'clock a.m., Tuesday, April 27, 1954.

* Refers to original Q. & A. typewritten transcript.

Spokane, Tuesday, April 27, 1954, 10 a.m.

Mr. Williams made an opening statement on behalf of the plaintiff.

JOHN NORMAN SEGERSTROM

plaintiff herein, called and sworn as a witness on his own behalf, testified as follows: (T50-104)

Direct Examination

My name is John Norman Segerstrom; I reside at East Farms, Washington, near the Idaho State line, in Spokane County, where I have lived all my life.

My father, H. N. Segerstrom, died in August, 1949. My sister lives with me and we are in partnership running the business, and my mother also lives with me. My sister is married and her name is Elizabeth Jane Hoskinson.

Our business is the growing of apples on 400 acres of orchard property, which we pack and ship all over the country and abroad.

The packing of applies includes picking from the [35] trees into boxes, bringing them to the warehouse, where they are sent through the packing line, washed clean by a washing machine, graded according to condition and size, individually wrapped in paper, placed in boxes, the lid and label, is put on the box, and they are sent to cold storage or they are shipped out in refrigerator cars.

Our annual production of packed apples varies from 80,000 to 170,000, not including culls which

(Testimony of John Norman Segerstrom.)

are sent to processors, being an additional 30 to 40,000 boxes annually. On an average, our production is the equivalent of 120 refrigerator railroad cars, there being 800 boxes to a car.

Prior to July 8, 1953, we had a warehouse 550 feet long by 50 feet wide situated on the Spokane International Railway tracks at East Farms and in the center of our orchards, where we conducted our packing and cold storage operations. On that date, there was an explosion caused by the formation of gases from this roofing material that substantially burned the plant down, with only the walls and floor left in one section.

The manufacturer of this roofing material is the Panther Oil & Grease Company, the defendant in this action.

(Objection was made to the question: "How did you come to have that roofing material?" on the ground the Court had previously ruled out the issue of express or implied warranty. (T55) [36])

Following a discussion between Court and counsel, in the absence of the jury, the Court ruled the witness might testify as to the conversation with the salesman of the roofing primer as bearing upon the alleged negligence of the defendant in failure to warn plaintiff of the character of the product and as general background to the transaction; that there would be no basis for recovery on the ground of breach of warranty, as the Court would instruct the jury on the elements of proof necessary for recovery; that objection would be sustained to any ques-

(Testimony of John Norman Segerstrom.)

tion clearly calling for an answer tending to show implied or express warranty. (T55-62)

In the presense of the jury, the question, in substance, was repeated, at which time the objection was renewed, was overruled, and the following testimony elicited:)

An elderly gentleman named Mr. Brynildson approached me about re-roofing our cold storage section of our warehouse. I had not met him before. He said he was representing the Panther Oil & Grease Company of Dallas, Texas, and he called his product Battleship Liquid Asbestos Roofing.

Ultimately, I signed an order for 325 gallons of asbestos roof coating and 162 gallons of Battleship primer, because the salesman said I would need the primer to prepare the roof for the final roof coating, and I believe that order is Plaintiff's Exhibit 12 for identification, which I read [37] before signing on probably the date it bears, March 20, 1953. The bottom half of the reverse page of the order was not made out in my presence. I think I signed a blank order blank.

(Upon motion, the witness' statement of signing a blank order form was stricken.) (T65)

Plaintiff's Exhibit 12 admitted. (T66)

I think the salesman left me a copy of the order, but I really don't remember.

(A blank order form supplied plaintiff by defendant was marked Plaintiff's Exhibit 13 for identification.)

Plaintiff's Exhibit 13 admitted. (T67)

(Testimony of John Norman Segerstrom.)

In selling me this material, the salesman told me any amateur could apply the roofing; that it didn't require skilled labor. He did not tell me there was any hazard connected with the use of this material; that it might be subject to explosion or fire, or that there was any danger in using the material inside a building.

The salesman left me Plaintiff's Exhibit 15 for identification when I gave him the order. I looked it over, but there were not any instructions contained in it, only advertising.

(There was an objection on the ground of disclaimer [38] by plaintiff of breach of warranty to the offer of Plaintiff's Exhibit 15, which objection was overruled, it being admitted by the Court for the purpose of showing the statement that unskilled labor could apply the material.) (T68-69)

Plaintiff's Exhibit 15 admitted. (T69)

I observed in Exhibit 15 the statements: "Battle-ship Features—Easily Applied by Unskilled Labor!" and "You Save Muss, Fuss & Worry." The salesman did not mention anything to me about the volatile characteristics of this material.

About a week after I placed the order for the roof coating, I received a letter of thanks and some little pamphlet of instructions from the Panther Company, Plaintiff's Exhibit 14 for identification. This was the only communication from the defendant company between the time I gave the order for the material and the fire on July 8, 1953.

Plaintiff's Exhibit 14 admitted. (T72)

(Testimony of John Norman Segerstrom.)

When I received Plaintiff's Exhibit 14, I observed on its face it said: "Instructions for Applying Battleship Asbestos Roof Coating." There was nothing to indicate it as being instructions relating to the primer. On page 3 thereof I observed the following: "Do Not Heat or Thin Battleship. Do not heat Battleship with an open flame. Do not thin it." [39]

Excerpts from Plaintiff's Exhibit No. 14:

* * * * *

"Please * * *

Read This Page before starting application!

Do Not Heat Or Thin Battleship

Do not heat Battleship with an open flame. Do not thin it. When either is done, the waterproofing qualities of Battleship are damaged. Hence, a proper job is impossible. If, in extremely cold weather, it is necessary to heat Battleship, do so by placing the drum in a warm room 72 hours before the material is to be used."

* * * * *

"Application

(Make Doubly Sure Your Roof Is Absolutely Dry Before Applying Battleship.)

Before applying Battleship Liquid Asbestos Roof Coating, it is recommended that a primer coat of Battleship Primer, in the amount of 1½ gallons to 100 square feet, be applied to composition or felt roofs that are extremely dried out or porous."

* * * * * [40]

(Testimony of John Norman Segerstrom.)

When either is done, the waterproofing qualities of Battleship are damaged."

(Objection was made to the question: "And what, if anything, did you conclude in your own mind upon reading that as to whether there was anything dangerous about heating Battleship?" as calling for a conclusion of the witness and speculative. (T73)

(Following a discussion between Court and counsel, in the absence of the jury, the objection was sustained.) (T74-76)

(The noon recess was taken.)

2 o'clock p.m., Tuesday, April 27, 1954

(The plaintiff, John Norman Segerstrom, resumed his direct testimony as follows:)

I am a graduate of Gonzaga High School and Washington State College, having taken a liberal arts course with the idea of becoming a high school teacher. I have never had training in chemistry or any engineering field. Prior to the explosion and fire involving the warehouse, I knew that gasoline gave off vapors which were subject to explosion or rapid burning, but I did not know that was true as to other petroleum products. [41]

About the first part of April, two or three weeks after I signed the order, the material arrived. Plaintiff's Exhibit 17 for identification looks like an invoice to me, but I don't remember seeing it before and I don't remember handing it to you, Mr. Williams, but I might have.

Rhea Rosenbaum, my foreman, called me and

(Testimony of John Norman Segerstrom.)

said the material had arrived at the warehouse. I told him when the slack season came where we had labor available, to apply the roofing to the roof of the cold storage section, and that in the meantime he should put it out of the way some place.

On July 6th he again called me and said he had labor available to apply the roofing and asked if it was all right to go ahead. At that time he asked me for directions as to how to apply the primer.

(An objection was made to the question: "How did you respond, what did you say to Mr. Rosenbaum, as to any directions about putting the material on?" on the grounds of hearsay, not within the issues and not binding on defendant. (T83)

In a discussion between Court and counsel out of the hearing of the jury, Mr. Williams advised the Court it was his intention to prove Mr. Segerstrom told his foreman there were no directions as to the primer.) (T83-85)

I told Mr. Rosenbaum there were no instructions on [42] applying the primer and to go ahead and put it on.

The next thing I heard the plant had burned down. I was in Spokane at the time and returned home about 2:30 or 3 o'clock in the afternoon. Subsequent to Mr. Rosenbaum's calling me about applying the primer, I did not go over to the plant because I did not have time, so I knew nothing further of the matter until after the destruction of the plant.

Prior to the fire, I thought this roofing primer

(Testimony of John Norman Segerstrom.)

was asbestos. It said "asbestos" on the name. I did not know that it was asphalt or had any petroleum products in it, and was not aware there was any hazard of explosion or fire.

Cross Examination

(T88)

I am 37 years of age and graduated from Washington State in 1941. After graduation, I returned to the ranch and helped my father manage the business. I drove him around as he was an invalid and couldn't drive. During the time I was in school, I worked summers on the ranch and helped operate the place. During the packing season, I was in school. The general work in the operation of the orchards in the summer is mostly irrigating and spraying.

In 1947, after I was out of school, a new warehouse was built, my father looking after most of that. I [43] don't remember whether the roofs on the warehouses and other buildings were patched after I left school in 1941, but they might have been. My father ran the ranch. I helped him, but he was the boss.

I remember my deposition being taken on April 8, 1954, in the offices of my attorneys, and, in response to questions, I answered that I thought my foreman could apply the primer without any instructions; that he had put on lots of roofs; that we repair roofs every year; that I did not actually see him put them on or actually engage in the

(Testimony of John Norman Segerstrom.)

work; that we get a barrel or so of roofing and patch roofs every year.

Some years we did and some years we didn't. I do know that some roofs were patched nearly every year.

I also testified on my deposition that I knew the roof coating had been put on in prior years because we had bought the roofing; that I didn't know whether it was asphalt roofing or the same thing that was put on.

I thought Mr. Rosenbaum knew how to put the roof coating on, which is the reason I didn't give him the instruction book I had received.

(It was stipulated between counsel that Defendant's Exhibit 19 for identification was received by the plaintiff together with Plaintiff's Exhibit 14.)
(T95-96) [44]

Defendant's Exhibit 18 has to do with Battleship Asbestos Roofing Coat; there is nothing about primer there.

Defendant's Exhibit 19 admitted. (T96)

The instruction book I received by mail didn't have anything in red here, as I remember it, though it might have had. As I remember it, it was small, black letters in the middle of the book. To my memory, Defendant's Exhibit 18 is entirely different from the one I received by mail with the invoice, Plaintiff's Exhibit 14.

Defendant's Exhibit 18 admitted. (T97)

At the time I thought just anyone could put on any of the Battleship preparations, because that is what was said in the folder and that is what the

(Testimony of John Norman Segerstrom.)

salesman told me. The folder said any amateur could put it on. I got that belief either from the salesman or the pamphlet.

The pamphlet I received from the company headed in bright colors, "Read These Instructions Carefully" concerned the asbestos roof coating. I don't believe I read the letter Exhibit 19. I didn't even know I had it until my counsel produced it and reminded me of it. I think I told Mr. Rosenbaum there was an instruction booklet, but there wasn't any special instructions about it, but I didn't tell him there was a letter with the instruction booklet.

All the records pertaining to purchases of roof coating in prior years were burned up in the fire. There might be book entries of those if we dug back far enough, but I don't know that we would be able to find them. Mr. Anderson, a certified public accountant, with offices in the old National Bank Building, has been keeping my books for several years. I don't know whether he would have those records or not.

The roof coating said it was asbestos. That is the only name it has got. I have seen asbestos and it is a grey material. I did not look at this roof coating or primer or Battleship plastic or any of the other products to see what they looked like. I thought this material was asbestos in a liquid form. I didn't know what it was. I have seen roof coating that was other than black in color, such as aluminum colored and all different colors roofing.

(Testimony of John Norman Segerstrom.)

I have seen men spreading material on our roof which was black in color, but it said right on the barrels it was asphalt roofing.

I have great faith in Mr. Rosenbaum and I left it up to him to do whatever he felt best in putting on this roofing. He was worked there 15 or 16 years, had general charge of the work, and had applied or supervised the application of roofing on several other occasions. [46]

Excerpt From Defendant's Exhibit No. 19

* * * * *

"There's one thing of importance regarding Battleship Asbestos Roof Coating that we'd like to bring to your attention. It's a product that we believe to be the finest in existence for the repair and maintenance of roofs. We've put all of our chemical knowledge and manufacturing skill into developing its formula and composition. Hence, its quality and capability, to our minds, is beyond question.

"But to get the finest possible results it's necessary to apply it according to our simple, printed instructions. Reasonable care should be exercised in seeing to it that the roof surface is well-cleaned before Battleship is applied—also to see that necessary patching of large cracks and breaks is done before the application. These preliminaries to the application are easy, though extremely important. They are clearly and simply explained in the at-

(Testimony of John Norman Segerstrom.)

tached booklet, 'Instructions for applying Battleship.' Please read it over carefully.

"Also, please see that the recommendations are adhered to when your shipment of Battleship is applied to your roofs. On this basis, we're both happier—you, because your roofs are placed in excellent condition at mighty low cost, and we, because you're happy and pleased with the results obtained through using our product." [47]

* * * * *

RHEA ROSENBAUM

called and sworn as a witness on behalf of the plaintiff, testified as follows: (T105)

Direct Examination

My name is Rhea Rosenbaum; I reside at East Farms, Washington, right among the Segerstrom orchard property, with my family, and have lived there since 1935. I have been employed by the Segerstroms continuously since 1935, but I had worked there previously. Since 1937 I have been the foreman, which involves the work of growing the apples and taking care of the packing plant in the fall, supervising the field men.

Prior to the fire on July 8, 1953, I was very familiar with the large warehouse building, having been in and around it nearly every day in my employment. I think it was around 1946 or '47 that I had some roof coating put on part of this building, and at other times I have done some patching work.

(Testimony of Rhea Rosenbaum.)

I went two years to high school and two years to business college. I have never had any training or experience in the fields of chemistry or engineering, and prior to the fire I had no knowledge that roofing materials might give off gas vapors which were subject to explosion or flash fire.

The first I learned that Mr. Segerstrom had purchased some of the defendant's roof coating was when it [48] arrived by auto freight about the first part of April. I asked Mr. Segerstrom what should be done with it at that time, and he told me to put it in the plant there, which was about the only place we had for storage and was where we were going to use it. He instructed me to put it on later when we had more time. We put the material in the west part of the cold storage part of the plant. I don't believe the cold storage section was under refrigeration at the time, because we shut it off right around the first of April and I believe this came in a little later. It was not under refrigeration from that time until the time of the fire.

As well as I remember, I believe there were three 50 or 55-gallon barrels of the primer and probably four or five of the roof coating. The only label I remember seeing on the roof coating was this Battleship brand, stating it was asbestos roof coating and made by the Panther Company, and the primer had the same label except it said "Primer". I saw no other label or tag or anything of that sort indicating any hazard connected with the material in

(Testimony of Rhea Rosenbaum.)

those barrels, and I examined them carefully at that time.

Two or three days before the fire, I am not sure, but I believe it was Monday, the 6th of July, about 10 or 11 o'clock, I talked to Mr. Segerstrom about applying the roof coating as we had a little time. Then on Tuesday night, which I believe was the 7th, I called him up after I had [49] examined the barrels and was wondering about the procedure of putting it on. I believe that was the day before the fire. At that time I told him we were ready to put this primer on and that I had examined it and it was awfully thick, and I asked him if he had any instructions or if it took any particular know-how to put it on.

It was on Monday that I discovered the material was pretty thick. I had opened up a barrel and I think I took a stick and stirred it and discovered it was awfully thick, and I didn't think it could be put on in that condition. That is the reason I put it out on the porch where it could warm up on Tuesday. I placed the barrels, three barrels of primer and some of the other, out on a loading dock on the south side of the building where it was exposed to the rays of the sun. It was a warm day with the temperature around 90 degrees.

We did not attempt to apply any of the material on Tuesday, but on Wednesday morning we took a barrel of this primer in and took part of a pail out and up on to the roof and tried to spread it, and we found it was just a little too thick, that we

(Testimony of Rhea Rosenbaum.)

couldn't spread it. We brought the barrel into this large room.

Plaintiff's Exhibit 20 for identification is a floor plan of the cold storage section which I helped prepare. The dimensions of the cold storage section are 50 by [50] 325 feet, and the floor plan is drawn pretty close to a scale of one inch equals 10 feet. I think it is a pretty accurate portrayal of the shape of the cold storage section of the building.

Plaintiff's Exhibit 20 admitted. (T119)

The reason I took the primer inside the building before drawing the pail from it was that we were figuring on taking it up through the manhole there. It was more a matter of convenience.

The compressor room is indicated on the floor plan by a small square in which I have written the words "Compressor Room." This room is fully enclosed by concrete walls. This is the center of the floor plan, this half with the two rooms, with the door in the center, the large door in the west end, a door here, and a door there (indicating on Exhibit 20.) On the morning of the fire, July 8th, the large door at the west end of the building was open, as were the two doors in the two partitions or rooms comprising the westerly half of the building.

In the easterly half of the building there was one large opening, and in the extreme east end there is a door on both the north and south sides. The similar marks on the east wall indicate doors that went into the packing room.

The manhole was located directly above this cor-

(Testimony of Rhea Rosenbaum.)

ner [51] of the compressor room, being the north-east corner, where I have written "Manhole," with the permanent ladder right along that side.

Our plan was to use a rope hook on the pail in lifting the material on to the roof through the manhole.

When the material was set outside the day before, it was placed directly in front of the door on the south side of the building directly to the west of the compressor room on the loading dock. We brought one barrel in and set it in the corner where the east wall of the compressor room joins with the south wall of the building. We then drew off the first bucket and took it up on the roof and tried to spread it, but found it was too thick. The material was not as thick at that time as it was the day before when I checked it inside the building, but it was still rather thick. On the morning of July 8th, the temperature was again around 90 degrees.

When I found the material wouldn't spread, I went down and made a stove. I had observed roofing contractors heating roofing material on some kind of a stove and that was the only way I knew to heat it after it didn't warm up enough in the sun. Before doing this, I again examined the barrel as to any instructions, but there were none.

I obtained a 50-gallon drum and I cut a hole in the top about 12 inches by 18 or 24 inches. I guess you would call [52] it the side as I laid the barrel down lengthways so that the side was resting on

(Testimony of Rhea Rosenbaum.)

the ground. I then cut a hole in one end so we could get some wood in and a hole in the opposite end for the smoke to come out. The hole I cut in the top or side of the barrel was where we were figuring on setting these pails.

I think Plaintiff's Exhibit 21 for identification is a fair representation of the stove which I made. The line across the page would represent the floor. The hole in the top was cut large enough to accommodate two pails measuring about 12 inches each, or about 24 inches, I imagine. The smoke hole was pretty round in shape and the one in the other end was more or less round or oblong, probably.

Plaintiff's Exhibit 21 admitted. (T131)

After making the barrel stove, I took it up and put it in this large room and we put a fire in it and after a short time we proceeded to use it to heat this material. We used apple wood in building the first and we let it burn awhile until it burned down and we started to heat the material. By that time the fire was more or less coals. The reason I did that was because I thought it would not be very nice to work where there was flames. I had no idea that the material would have a tendency to give off vapors that would be explosive. I thought it might possibly burn if some of it spilled directly on the fire, but not in such [53] proportions as to endanger the building. I didn't think there was any danger involved in heating the material on this stove.

I have placed on Exhibit 20 a small circle with

(Testimony of Rhea Rosenbaum.)

the figure "1" and my initials "R.R." indicating where the barrel stove was located. With reference to the north and south walls, we tried to place it as near the center as possible and it was 30 or 35 feet east of the west partition. This room had a concrete floor; the walls were pumice block with a wood lining with insulation in between; the ceiling was of wooden construction, 18 feet high; and the roof was a round roof.

We used four pieces of angle iron to support the pails on top of the barrel stove and to stabilize them.

Plaintiff's Exhibit 22 for identification is the type but not one of the actual buckets we were using.

Plaintiff's Exhibit 22 admitted. (T136)

Tom Woods was delegated by me to tend to the fire and heating of the material on the stove, and Roy Torvik and Elwood Rosenbaum, my brother, were going to spread the material on top of the roof. I was not present at all times during that morning but was back and forth. I told Mr. Woods to be a little bit careful and not spill a bucket, something to that effect, in handling this material while being heated [54] on the stove, for the reason I presumed it might burn if it were spilled directly on the fire. I didn't know to what extent it might burn, but I didn't figure it would amount to too much. I believe I mentioned to Mr. Woods not to put any wood in only just when the fire got down low, something to that effect, to keep it to coals as much as possible. Of course, you have to add a

(Testimony of Rhea Rosenbaum.)

little wood once in awhile to keep your fire going.

It must have been about 8:30 or 9 o'clock that we started heating this material. I was back and forth there probably three or four times that morning and no trouble was experienced while I was there. Around 11:30 or 20 minutes to 12, I returned to the building and I told the boys to finish up that barrel of primer and quit for the day as it was getting rather windy. They were nearly through with the barrel. I left a little before noon.

My brother, Elwood, was the only one who had his lunch with him and I believe I suggested he eat his lunch there. I don't believe I gave him any particular instructions as to the pails or the fire in the stove. I did not return then until the fire occurred.

The door at the west end of the building was open during the entire morning, as were the doors on the two inner portions, the door on the south side of the building by the compressor room. I don't remember, but I don't believe the [55] doors on the north side of the building were open.

In placing the stove inside of the room when I decided to heat the material, I didn't think there was the least bit of danger in that large room as I hadn't seen anything on the barrels or had any instructions to that effect, and it was a matter of convenience in taking it up through the manhole, rather than carrying it up over those docks.

I believe Mr. Woods took his finger and dipped it in the material to see when it was warm enough

(Testimony of Rhea Rosenbaum.)

or thin enough to spread. I would say he was leaving the material on the stove about 10 or 15 minutes.

I would say this material smelled a good deal like tar as we were taking it from the barrel. I did not detect any fumes or odor that smelled like gasoline or anything of that sort.

There might have been a few pallets at about the extreme east end of this large room; otherwise, the room was empty. To my knowledge, none of this material was spilled on the floor.

On my way back to the building about 1 o'clock from lunch, I saw the smoke when I was about a half or three-quarters of a mile away. I started over to call the fire department, but was informed they had already been called, so I went back to the building and tried to help the fire department when they came. [56]

When I arrived at the building, I found a fire going and smoke coming out of the roof. It seemed like the whole inside of that large room was burning.

I never had any knowledge or inkling that this primer was subject to giving off any vapors that might explode or cause a flash fire. I never had any experience with such a thing in the past.

After the fire, we had one barrel of primer that was full and another with very little left in it of the three barrels. Apparently, the one had been spilled sometime in the confusion of the fire. Only the empty barrel remained of the one inside the building.

(Testimony of Rhea Rosenbaum.)

We took the full barrel of material down to the headquarters at my house and placed it under a tree when we started cleaning up. I believe it was at your instructions that we did this. Later you told me to place it under cover, and I put it under a machine shed where it has remained until this time. I know there have been samples taken from the barrel from time to time.

Plaintiff's Exhibits 1 to 4, inclusive, for identification represent the burning of the Segerstrom building. I don't know who took the pictures, but they are a fair representation of the building as it was burning.

Plaintiff's Exhibits 1-4, inclusive, admitted.
(T147) [57]

(It was stipulated that Plaintiff's Exhibits 5 to 10, inclusive, were photographs of the remains of the Segerstrom building after the fire.)

Plaintiff's Exhibits 5-10, inclusive, admitted.
(T147)

(It was stipulated that Plaintiff's Exhibit 11 for identification was an aerial photograph of the building taken after the fire.)

Plaintiff's Exhibit 11 admitted. (T148)

The large section with the walls remaining shown in the aerial photograph, Exhibit 11, is the cold storage section, and the foundation of the packing section is shown to the east.

(Testimony of Rhea Rosenbaum.)

Cross Examination (T149)

The fire occurred on Wednesday, July 8th, and it was the day before that we put the barrels out on the loading dock which extended probably nine-tenths of the way along the south side of the building. There were three large doors on the south side of the building, plus a little door in the compressor room. We put the barrels out a little before noon on July 7th, the day before the fire. Prior to that, they had been in the cold storage section. I think the refrigeration had been shut off shortly before the barrels were placed in there. The cold storage section had [58] been under refrigeration and maintained at a temperature of about 32 or 33 degrees all winter prior to its being shut off. Then the doors were kept closed during the balance of the spring and summer pretty much, except when working there.

The walls, ceiling and doors of the cold storage section were insulated with about 8 inches of balsam wool and Zonalite insulation.

On Monday, two days before the fire, I opened a barrel of the primer and took a stick and stirred around and saw that it was awfully thick, so I just presumed that we couldn't pour it out. The opening in the barrel was about two, two and a half inches. I just poked the stick down in.

Then the next day toward noon we moved it out on the loading dock, which had a partial roof some 8 or 9 feet high above the dock extending out to

(Testimony of Rhea Rosenbaum.)

about the same extent as the dock itself. The dock was constructed so that apples could be wheeled across the dock and directly into a freight car, and the roof was there to protect the apples or anything that might be there waiting to be loaded. This was just a small porch over the doorway of about the width of the door, between 5 and 6 feet. The barrels were in the sun in the afternoon. That is the door near the compressor room on the south side of the building. The door on the west end is the widest one, being over 12 feet.

The morning of the fire I went to work sometime [59] after 7. Our working hours are 7 to 4:30. It was probably sometime between 7 and 8 that we got started that morning and moved one of the barrels inside. We put a spigot on the barrel and then laid it on its side. We didn't try to stir it. The spigot was large enough to fit a 2 or 2½ inch hole, and the orifice where the material came out was probably an inch and a quarter or an inch and a half. I found that it had thinned out some since the prior day so that it would run pretty slow through the spigot. In my opinion, it wouldn't have run through the spigot the day before.

(An objection was made to the question: "And if you had known the instructions told you to leave it in a warm place for 72 hours, you would have done that, wouldn't you?" on the grounds of calling for a conclusion of the witness and speculation; overruled.) (T158-159)

"Well, I presume I would."

(Testimony of Rhea Rosenbaum.)

I did draw out a bucket of the material.

Plaintiff's Exhibit 22 is not one of the buckets we were using. As far as I know, the buckets we were actually using were thrown away. I couldn't find any of them. They were similar to Exhibit 22, but I don't know if they had the same type of bottom fastening, nor do I know what Exhibit 22 contained when it was received. We had quite a few of those around which had contained insecticides originally, and we [60] needed many pails for use in spraying so we had picked up pails here and there.

I had also set out two or three barrels of the roof coating on the loading dock outside of the door.

I went up and watched the men try to spread the material on the roof. I am a working foreman, I do repair work, but I am not supposed to do too much work. We were using new brushes that Mr. Segerstrom had purchased. I concluded it was still too stiff to spread.

It did not occur to me to let it sit out in the sun to thin, because, being 90 degrees, I presumed that it should have warmed up enough to spread it. It wasn't 90 degrees the night before. I had had no trouble in spreading primer before was what I was going by. I don't know what the temperature was the night before. We didn't open the bungs or test the material in but the one barrel.

After building the barrel stove, we made a frame around under the barrel with brick to keep it solid.

(Testimony of Rhea Rosenbaum.)

We obtained the apple wood from a supply we keep sawed up on the place at all times for use as fire wood and some of which we sell. We did not choose any particular size, but it was the right length because we had used it for heating the building in the packing season. It would probably average 28 to 32 inches in length and 3 to 6 or 7 inches in diameter, with a very few smaller pieces. We had to use a little [61] kindling to start the fire.

After the fire was built, we waited until it burned down. I started the fire myself, while Mr. Woods put the pails on the fire. I stayed there for the start of the operation and then I had men working other places, I was gone part of the time. I don't recall that I added more wood to the fire that morning, but there was probably some added because it wouldn't burn a half a day. I think I saw some added a time or two as the fire would go down. The last time I was there, between 11:30 and a quarter to 12, everything seemed to be going all right as far as I could tell.

The only odor I noticed from the material was the tar smell. I never noticed any petroleum smell in drawing it out of the barrel or later. I did not know the material would be dangerous if exposed to a flame. I hadn't thought much about it.

My deposition was taken on the 7th of January in the offices of Cashatt & Williams when I was asked various questions and testified I presumed the material might be dangerous if exposed to a flame, but I had in mind if it came directly in

(Testimony of Rhea Rosenbaum.)

contact with the flames. I answered "Yes" to the question my common sense would tell me that, but I was thinking in terms of it might burn if it came in contact with the fire. In reply to a question as to whether I [62] distinguished any odor as to this primer we were using, I answered that it just smelled like tar or probably a petroleum smell, which was true at the time and is true yet. In response to the question: "It had the smell of petroleum?" I answered, "Yes, I guess that is it." To the question: "When you said 'tar,' you were referring to pine tar?" I replied, "Yes, black stuff." To the question: "If you know pine tar, that is very similar to that which is used for roofing, but asphalt also is frequently used for roofing. Which one did you mean when you said 'tar?'" I answered, "I meant asphalt."

I did not know what asphalt was at the time; I am not familiar with roofing; I have heard them talk about tar roofing. I presume I knew what a petroleum smell was, and I knew that petroleum was inflammable and dangerous to have around fire in one sense of the word, that when you talk about petroleum, I think about gas or something. I imagine there are several products of petroleum. I automatically think of gas when petroleum is referred to. I did not know that petroleum gives off a gas. There is a smell to it, and I guess that is the smell I smelled the morning of July 8th when I put this stuff on the fire, I don't just remember.

If I had been given an instruction book which

(Testimony of Rhea Rosenbaum.)

said: "Do Not Heat or Thin Battleship," I wouldn't have done that, as I usually obey orders. [63]

After the fire, there was one barrel we had had inside the building drawing the primer from that was practically empty before the fire started and the other two were still out on the platform, one of which had been turned over and the other one we salvaged was still sitting there. Altogether there were two barrels of primer on the platform and I believe two or three of the roof coating. The barrels of roof coating were turned over and the contents spilled. I don't know how the bungs or plugs got out of the opening of these barrels. I think the primer and the roof coating were in pretty much the same type of barrels. One barrel of primer was also spilled, but the barrel itself was pretty much intact. It looked as though the stuff had apparently spilled out through the bung of the barrel. I don't know whether the bung had been removed, but it wasn't there after the fire.

The barrel of primer that we saved seemed to be sitting out in front where they applied more water. I presume that is the reason it wasn't turned over. The bung was still in it, but I don't know if it was still in tight. I hauled it down to the place but I didn't open it.

During the fire there was a large amount of water poured on this warehouse and on this loading dock and, I presume, on the barrels of primer, although I wasn't watching them. We had our own

(Testimony of Rhea Rosenbaum.)

fire hose at the plant but it wasn't [64] used at the fire.

I couldn't recall the date but it was soon after the fire that I removed this barrel from the platform and took it out to my place at Mr. Williams' suggestion.

(Mr. Williams advised counsel it was the following Monday, five days later.)

Mr. Cashatt and Mr. Williams had been out in the meantime with some other gentleman a day or two after the fire. I don't know as I was with them, but I think they looked at the barrels of roofing material. They talked to me something about it.

To my memory, there was no water spilled on top of this barrel that remained intact that hadn't been spilled. With the rim around the top, if water from the fire had landed on top of the barrel and the bung had been open or loose, it could have run into the barrel. I didn't pay too much attention to it as I was pretty excited over the deal. If there is any water in the primer now, I don't know how it got there.

To my knowledge, the first samples taken from this barrel was sometime last fall by a gentleman with Mr. Williams and Mr. Cashatt whom I didn't know. I saw him only at a distance. The next samples I know that were taken was early this spring. I believe I met Mr. McGivern from Gonzaga when he took samples, but I couldn't say for sure. [65] That was sometime later in the winter.

If, at the time Mr. McGivern came out to take

(Testimony of Rhea Rosenbaum.)

his samples late last winter or early this spring, the barrel was only three-fourths full, I don't know what became of the balance of the contents. The barrel had been under a machine shed at ranch headquarters since the time it was removed from the loading dock.

The fire hose we had was located at the east end of this room. We had a fire extinguisher in the compressor room and another two or three were in the packing room.

As Mr. Segerstrom testified, I have had something to do with putting on roof coating and doing patch work from time to time on these warehouses on the Segerstrom place. To my recollection, in '46 and '47 we used similar material, put on a primer first and then the heavy coat later. In the meantime, I have had the men patch leaks here and there. I remember one of the men who did this was a man by the name of Bennett, who isn't working for us now, and another by the name of Kato, a Japanese boy we had working there. I was around at the time and showed them how to do it. I presume it was asphalt patching material, but I don't even know the name of it. The material had been on the place for sometime. It was black and had pretty much the same odor. It was thin enough to apply without putting it over a fire. We kept it, I believe, probably, in the basement of this building before [66] it was applied, which is not refrigerated.

(Testimony of Rhea Rosenbaum.)

We didn't open either of the barrels of the roof coating as we hadn't gotten to that yet.

I had observed the heating apparatus used by roofing contractors only at a distance driving along, but I never went up and checked them to see how they were arranged.

I think I told Mr. Woods to be careful with this stuff over the fire and around the fire, because I thought it might burn if it was to come in contact with the fire. It never entered my mind that there was any danger in putting petroleum over an open, hot fire. I believe Mr. Woods was carrying the material up in a pail and pouring it into these other containers on top. He was more or less keeping the edges of the pails cleaned off the best he could by using a stick and scraping it off and then we had a sack or two he would rub it off. I didn't tell him to do that, but I thought it was all right for him to keep it clean, as it might catch fire because of the heat coming up the side of the pail.

I am not too familiar with what a hip roof is, but I would call the roof on the building a rounded, arched roof.

I stated on direct I thought there was no danger of building a fire in this large room and putting this stuff over the fire. I think this room would be large enough for [67] that purpose. I thought there would probably be danger involved in a room with a 7 or 8 foot ceiling. I don't think a person would want to do it in a small room; I wouldn't want to do it in the kitchen of my house. I don't know as

(Testimony of Rhea Rosenbaum.)

I thought much about what would happen in that event. I just thought this big room was kind of like outdoors, this large room. I didn't think there would have been an explosion in a room the size of a kitchen. I thought if the room was large enough, it was reasonably safe. I presume a living room or kitchen or something would be unsafe, because you would be close to the walls and probably have a floor in it, and so on.

I didn't think at the time it was dangerous to cook petroleum over a hot fire. I knew something radically went wrong after the fire started.

A wind came up the day of the fire about 10:30, 11 o'clock after being more or less quiet in the morning. It was from the southwest. The door on the west end of the building was open. It must be around 12 feet wide and probably 10 feet high.

(It was agreed between counsel that the door on the west end of the building would be measured.)

The two inside doors of the refrigerated building were also open. Those are the ones between the two sections and they are pretty near as large as that other one, maybe [68] within a foot. The object you have indicated in Exhibit 8, I would say that is the north door from the outside. I can't see anything in the photographs indicating the partition in the building.

Redirect Examination (T191)

When I said that when I thought of petroleum, I thought of gas, I guess I meant gasoline, not a

(Testimony of Rhea Rosenbaum.)

vapor like heating gas or cooking gas. I was just using a common abbreviation for gasoline when I said "gas." I never gave it any thought, I never thought petroleum gave off any gas vapors which might be subject to explosion, before the fire.

The barrel that I moved over still has a label on saying "Primer," but I think it is pretty well faded or weathered. I doubt if you can read that. I am definitely sure that is the barrel of primer.

In my deposition which was partially quoted, I also testified that I didn't know what asphalt was made from, as well as I remember; that I knew it was inflammable if a flame got in the top of it; that that was the reason we let the flames go out; that in heating this material over those coals, I never thought there was any danger at all; that I had observed contractors using kind of a stove in heating their material in the roofing business and that that is what gave me the idea. [69]

(An objection was made to the question: "And as of that time, before this fire occurred, in your thinking that the material, if a flame got on top of it, that it might cause the material to burn, a fire of what proportions did you think might result?" on the ground of its being entirely too speculative; overruled.) (T193-194)

About all I ever thought about it, might be a little blaze that could be rubbed out, or something to that effect, probably just a little blaze, never thought there was a bit of danger.

(Testimony of Rhea Rosenbaum.)

In heating this material in a small room like a kitchen or living room, I thought the flame might be too close to the low ceiling; not that there would be any danger of an explosion. Had there been any printed warning on these barrels in connection with heating or exposing this material to an open flame, I wouldn't have done what I did.

(Witness excused and cause adjourned to 10 o'clock a.m., Wednesday, April 28, 1954.)

Spokane, Wash., Wed., April 28, 1954, 10 a.m.

A discussion was had between Court and Counsel pertaining to plaintiff's theory of measure of damages out of the presence of the jury. (T196-203)

Plaintiff's Exhibit 19 was read to the jury (T204) [70]

It was stipulated between counsel that Plaintiff's Exhibits 23 and 24 for identification were standard labels for Battleship Primer and Battleship Asbestos Roof Coating and would be attached to the said materials in the regular course of business. (T206)

Plaintiff's Exhibits 23 & 24 admitted. (T206)

TOM WOODS

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T207)

I live at East Farms, Washington, right near the packing house that burned, where I have lived about

(Testimony of Tom Woods.)

four years. I am employed by Mr. Segerstrom and was so employed on July 8, 1953.

I remember the day of the fire and I was right there when it happened taking care of the roofing. When I came to work that morning, I understood we were going to put the roofing on. I saw the barrel over in the south corner by the compressor room, the one we hoisted up on a platform so we could draw from it. I couldn't be positive if there was any other barrels in the room. I couldn't swear if that was the primer or the asbestos roof coating.

I recall drawing the first bucket from that barrel. We had to heat it, so after we got the fire going [71] and got the coals, we put it on where we was going to heat it.

Before we started to heat it, we tried to spread the first bucket on the roof. They called me up there afterwards and said it was too thick, they had to reduce it down, heat it. It would hardly run out of the drum, out of the spigot. That first bucket wouldn't hardly pour on the roof at all.

Rhea Rosenbaum decided it was to be heated, said we had to thin it down. He went and cut a big drum out, one of these big barrels, oval-shape, and then we had cross pieces across here, four, I believe, about that wide, two feet and something, anyway. The barrel stove was then placed about 20 feet from the south side and about 15 or 20 feet from where we hoisted it up.

The small room at the south side of the building is the compressor room shown on Exhibit 20. We

(Testimony of Tom Woods.)

had the stove where the mark "No. 1" and the initials "R.R." appear on Exhibit 20. The ladder up to the manhole was 15 or 20 feet away from the stove. The barrel of roofing material was back from the compressor room south, about over next to the wall, in the position indicated by the initials next to the little circle "T.W."

There was nothing in the room we were heating the material in except possibly a few pallets at the east end.

When Mr. Rosenbaum brought this barrel stove back, [72] we fixed it all up and blocked it up good and put our four irons on it across the stove and put our buckets on there. First, we built a fire of apple tree wood and let it burn down to coals. I put two buckets at a time on the stove and one bucket was put on so it would heat faster than the other. I think it was about 9 or 9:30 before we got started heating the material.

I would let the material get so that it was thin enough to pour, I would say a little better than lukewarm, and lots of times I would test it by sticking my finger in the material. It never got so hot that I couldn't stick my finger in it. I would leave the buckets on about 10 or 15 minutes. I don't think any of them was on over 15 minutes. When I tested with my finger, it was to see whether it was thin enough and whether it was getting too hot.

When I decided the material was thin enough, I would climb up the ladder and pull the bucket up with a rope with a hook attached to the bail of the

(Testimony of Tom Woods.)

bucket. Then I would empty the tar in the other two buckets on the roof and go back after another one. Elwood Rosenbaum and Roy Torvik were working on the roof and I would divide my bucket into their two buckets.

I never got the buckets over two-thirds full when I put them on the stove, half to two-thirds. I had never a blazing fire while I was heating this material, just the [73] coals is all there was. After you build a big fire with apple tree wood, they are pretty nice big coals. I was around that stove all morning until noon. I couldn't say how many buckets I heated on the stove, but the barrel I was drawing from was getting pretty well empty by noon, probably a third full, maybe not that much.

I never had any trouble all morning, never spilled any of the material on the floor, and I didn't add any wood during the morning. We had a big bunch of coals when we started and only worked two or three hours. It was after noon that the wind came up.

At noontime, I went home for dinner and Rhea's brother stayed at the warehouse. I got back about 12:30. Before leaving for lunch, I took the buckets off the stove and put them back away from the stove, and when I returned, there weren't any buckets on the stove.

After I came back from lunch, Mr. Rosenbaum said we would just put a few buckets on; that the wind was getting so bad we would have to quit on top of the roof. At this time there was no material

(Testimony of Tom Woods.)

spilled on the floor or any place, it was the same way I had left it.

Then the other two fellows went back up on the roof and I put two buckets of tar on the stove, set one on so it would heat faster and set the other over to one side. There was more heat under the center portion of the stove. [74] Then about a quarter to one or ten minutes to one I took one bucket up to the roof and emptied it, the same as I always did, and went back down after another one. At that time there was one bucket on the stove and there was no fire or flames in the stove. There was no wood in it at all, just coals. I tested that bucket on the stove and set it over so it would heat faster and turned around and started to get another bucket. It wasn't quite thin enough or hot enough yet. I tested it with my finger and it was getting warm, all right, but by the time I got another bucket, it would be about right to take up there then.

Then I started over to the barrel to get another bucket, I had my back turned to the stove, and there was just a big "whoosh" and I looked around and there was fire on the ceiling. I don't think I could make a sound as loud as it was. It was just like a great big "whoosh," just like that, I had never heard any sound like it before. When I looked back, everything was on fire, the whole ceiling inside of the room. The time I looked back, there was no fire on the stove, but just about three seconds later she is coming right back down on the floor from that round roof, in just a few seconds. When I first

(Testimony of Tom Woods.)

looked around, I did not see any fire coming off the bucket or on the stove or on the floor. The first thing I saw was the whole north side of the ceiling was all in flames, coming over that oval-shaped [75] roof right back billowing down.

The noise I heard was quite a noise. I was just about halfway between the stove and the barrel when it happened. I don't know if I felt any rush of air because I was so doggoned frightened. I just heard the noise and looked around and there it was. Then I went up the ladder and warned the boys on the roof. I don't think anybody could fly any faster than I went. They were working on the west end of the building. I hollered to them, "She's on fire," and they came over and they couldn't come down the place I went down. I went right back down the ladder and by that time the fire was all over the building. I went through the compressor room and went out the door to the south. There were three doors open, including the big door to the west, but I had no choice.

I have had about an eighth grade education. I don't believe I have any special knowledge, training or experience with oils or petroleum or asphalt. I wouldn't have been around there if I knew this material that I was heating over this stove might be giving off gas vapors. The stuff I was heating smelled like tar and it was kind of black in color, I guess. I don't know what you would call it, kind of dark, anyway. I never noticed for any label of warning on the barrel because Mr. Rosenbaum al-

(Testimony of Tom Woods.)

ways looked for that. I did not, myself, consider there was any danger about what [76] I was doing.

Cross Examination (T239)

The material we were working with smelled like roofing tar. The fire was built up at noon by Mr. Rosenbaum's brother. I wasn't there when he built it up. When I returned from lunch, I immediately put two pails on to heat. There were good hot coals in the stove, a little hotter than when I went to lunch, but it wasn't any too hot.

When I testified on deposition last January in Mr. Cashatt's office, I did not say, "Rosenbaum's brother watched the fire and built a good fire while we was gone;" I said he watched the fire. I never said he built a big fire. I was in Room 1121 Paulsen Building on the 7th day of January, 1954, but I believe that you got it wrong, I never said about building a fire. I don't know whether he built a fire or not. How did I know that he built a fire?

Not as I know of, I was not asked the question: "He built a pretty good fire that would last while, did he?" He probably did build a fire. I remember I was asked: "And it would last most of the afternoon?" and answered: "Yes, two and a half hours, probably."

I believe you did ask the question: "He built a pretty good fire that would last awhile, did he?" and I answered: "Yes, it was a good bunch of coals there." [77]

Maybe I did answer: "Yes, Rosenbaum's brother

(Testimony of Tom Woods.)

watched the fire and built a good fire while we was gone," and I remember I continued my answer: "We had enough so we had some coals after dinner." That is the way it was. I will say yes, then, he built the fire. I wasn't there.

I discussed my testimony with Mr. Williams that one time last January and only just talked a few minutes with him since. I haven't exactly talked with him about this particular testimony.

I put my finger in the top of the material to test it while it was being heated. I didn't stir it up from the bottom, but I felt of the bucket. Mr. Rosenbaum had told me to be careful with it and not let it get too hot. I never thought it would be dangerous, not unless you got it too hot or if you got it on the fire, it would be. I knew how hot it was on the bottom because I felt the bottom of the pail with my hand, the side of the pail.

On my deposition, I believe you asked me: "Might catch fire if it got too hot?" and I answered, "Yes." Anything will catch afire if it gets too hot, you know. I also answered: "Well, I have handled a lot of stuff like that myself, and he told me, he said, 'Be careful,' so I was." I don't remember if I answered that he told me not to have any blaze. Mr. Rosenbaum did tell me not to let it get too hot and I so testified on my deposition. Before that I had not [78] talked to anyone about what I was going to say.

When the fire started, I had already been upstairs with one pail and there was only one pail on

(Testimony of Tom Woods.)

the stove at that time. When I came down with the empty pail, I tested the tar roofing before I went over to the drum to fill the bucket by putting my finger in it and feeling of the side with my hand. It wasn't too hot but was plenty warm enough so I pulled it over to one side of the stove and went over to fill the pail. While my back was turned, this happened.

The only odor I could smell was just the tar smell while it was heating on the stove. By tar smell, I mean the kind of tar that is put on roofs. I had never done this kind of work before; I had watched it done as I went by.

After I came down the ladder, I didn't close any doors. I went out of the building through the compressor room. I couldn't get out any other way without making a new door.

There was no wood laying beside the stove. I saw the wood being put in in the morning; I wasn't there at noon. I didn't notice every stick of wood that was put on. I would imagine it was three or four inches through. We had two or three sticks on hand to put in the stove. I just got through telling you, sir, in the morning we built our fire and we never built no more fire until noon, no buckets on the stove. We didn't add any wood during the morning. If there was [79] enough coals at noon, we wouldn't build no more fire, if there was enough of coals left over. I didn't get more wood at noon.

ELWOOD ROSENBAUM

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T265—Vol. II)

I am Rhea Rosenbaum's brother, I live at Otis Orchards, and am employed by the Segerstrom Fruit Company, the Segerstrom family, and was so employed on July 8th of last year.

Just before the fire occurred, I was on the roof of the building as a member of a crew engaged in doing some roofing. The other members of the crew were Roy Torvik, Tom Woods, and Rhea Rosenbaum was supervising. When this happened about between 12:30 and 1 o'clock, Roy Torvik and I were on the west end of the roof. I imagine we had started that morning about 10 o'clock. I never kept track of how many buckets we applied. About the time this happened, the wind was blowing rather strong from the west.

We quit work at 12 for half an hour and I stayed in the building and ate my lunch and kind of watched the pot there, and the other fellows went home. There was just [80] coals in the stove at that time. I didn't add any wood at noon and, as far as I know, none was added.

When we first started that morning, I was up on the roof cleaning up and I didn't see the barrel the material was coming out of. I saw a barrel that they had propped up, but I never paid much attention to it. There was a bucket that was brought up

(Testimony of Elwood Rosenbaum.)

to be applied without heating. We tried to put it on but didn't have very good luck with it because it was too thick. I didn't watch them while they were heating the material, but I knew they were doing it.

I added no wood at noon and there was just coals in the stove when I went back up on the roof at 12:30. During the lunch period there were no buckets on the stove, and I don't know if there were any on when I went back up on the roof.

I would say Mr. Woods brought about one bucket up after lunch some 5 or 10 minutes after we got back up there. The next thing that happened was Mr. Woods hollered it was on fire. He just stuck his head out of the manhole and hollered "Fire" and disappeared. I didn't feel anything or hear anything at the time. Then I tried to go down through the manhole, but the smoke and the heat was so great we couldn't get down through, so we went to the east end and got down by jumping down on the roof of the packing plant and going down a ladder from there. I then came back to the room where the [81] heating was being done, but you couldn't get in there because of the smoke. I saw a few flames but not very many. I never went in the room but just looked in from outside.

When Mr. Woods stuck his head up and hollered "Fire," I never noticed any smoke then, but there was smoke coming through the manhole by the time we got over there.

(Testimony of Elwood Rosenbaum.)

Cross Examination (T275)

There were two manholes, one in the ceiling of the cold storage section and another one in the roof. To get up the roof, you climbed first through the hole in the ceiling then used the ladder to go on up to the roof.

After lunch, it was just a short time, probably 5 or 10 minutes, until Mr. Woods brought up a fresh pail. If I remember right, I think we had a little bit left we were using in the meantime. We each had a pail and he would divide the bucket between the two pails. He never took down the pails we had been using.

I don't know who built up the fire at noon. I was in the room where the stove was all the time while eating lunch. Mr. Woods and Torvik came back together and then Torvik and I went back up on the roof. I didn't see anyone else in the room with Woods at that time. If the fire was built up, I don't know who built it.

The stuff we were working with just had a tar [82] smell, is all I could tell you, but I didn't notice it at all.

I don't remember just distinctly whether we kept rags to wipe the pails off with from time to time. I think on my deposition last January I did say I had a rag to keep wiping the stuff off the edge of the pail. It dribbled over the side a little bit in putting the brush in and taking it out. We never poured any of the material on the roof and then

(Testimony of Elwood Rosenbaum.)

spread it, but dipped the brush in the pail and then spread the roofing.

Redirect Examination (T280)

I really wouldn't know how long it was after Mr. Woods brought the pail up after lunch until he came up and hollered "Fire."

ROY TORVIK

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T281)

I live at East Farms, Washington, am employed by Mr. Segerstrom, and was a member of a roofing crew putting material on the roof of the Segerstrom building when it burned down last July 8th. I was with Mr. Rosenbaum on the roof applying the material. I heard him testify and my story would be about the same as his. [83]

Before any of the material was heated that morning, we tried to put it on, but it was too thick. I couldn't say how many buckets we put on that morning. I started working at 7 cleaning the roof before we started putting the tar on.

At noon, I went home to lunch and returned around 12:30. I was a little bit late. I went through the building where the stove was and back up on the roof. I didn't notice whether there were any buckets on the stove at that time, but I didn't see

(Testimony of Roy Torvik.)

anything wrong then. After lunch, I think Mr. Woods brought one bucket up on the roof in about maybe 10 or 15 minutes after we got up there. Then the next thing that happened Mr. Woods stuck his head up and hollered "Fire" and jumped right down. It was a couple or three minutes after he brought the bucket up that he came back and yelled "Fire." We were working on the west end of the building and we then tried to get down. We headed for the manhole on the run, but there was too much smoke and heat coming out. I didn't see no flames at that time. I don't think I saw any smoke when he hollered at us from the manhole. We just took a quick look down the manhole and then run to the east end and jumped on the old building and then down the ladder. I didn't look in the room where the stove was, but looked in another room where there was a lift truck sitting. I thought maybe I could get it out, but there was too much smoke. [84]

Cross Examination (T286)

I went by the manhole in the roof, stood long enough to see the smoke was too thick and then went on over to the east end of the building and jumped down on the roof of the other building. I guess there were three buildings there. I jumped off the roof of the west building onto the roof of the adjoining building in the middle, and there was a ladder on the north side of that building to get down on the road there. Then I went around and closed the big door in the west end of the building,

(Testimony of Roy Torvik.)

and I couldn't see any fire there. I looked inside and the building was full of smoke. I don't remember if I closed any other door or not because I was a little bit excited.

I didn't help build the barrel stove, but I helped them set it up. It was big enough so you could put two pails side by side on at a time for heating.

I didn't have anything to do with moving the roofing material out of the warehouse the day before or back into the building the next morning, and I don't know who did it. [85]

IRA HOSKINSON

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T290)

I am the husband of Mr. Segerstrom's sister, and I reside at the Segerstrom home. I work around the orchards there and was so engaged on last July 8th when this building burned down.

Immediately prior to the fire, I was driving east directly toward the warehouse, the west end. From the road I was on, you can drive directly into the warehouse. There is a jog that goes around the side of the warehouse, jog north and then back east. Driving east along that road, you can see the warehouse for over a mile. You are looking straight at the west door.

I came out of one orchard and I made a turn, going east about a mile away from the warehouse, and I was within a quarter of a mile or less and I

(Testimony of Ira Hoskinson.)

saw a huge flash inside the building through this doorway. I also at that time saw two men on the west end of the roof. I was very curious, I didn't know what was going on. I parked at the end of the west door and ran inside and saw this huge room was just enveloped in flames, ceiling and walls, and it was just a whirling flame, the cold storage section. [86]

I saw Mr. Woods to my right next to the ladder, between the ladder and the door out through the compressor room, and he says, "She blew up, she blew up." I had already seen the fire and I said to him, "Tom, let's get out of here."

I ran out back through the west door to call the fire department. I ran into one of my irrigators out there and sent him to the post office, about a quarter of a mile on east.

I don't know how Tom got out of the building. I never saw him again until he was on the south side of the building.

Before I saw the huge flash, I hadn't seen a thing, just the open doorway. It just lit up in a crimson, fiery, orange color. I then proceeded directly up there, parked and went right in. At that time, the big room was completely enveloped in flames, the ceiling, and churning down both side walls.

Cross Examination (T294)

I saw Roy Torvik close to the west door and we went back into the plant to try to save the lift trucks in the middle room, but we couldn't get near them. When Torvik closed the west door, I was

(Testimony of Ira Hoskinson.)

directing cars on down the road so they wouldn't block the fire wagons. Before [87] that, I had seen him on the roof, and then I was back inside the building with him before he closed the west door. I was about 30 feet away from him when he closed the door, west of the building, and I couldn't see any flames at that time.

I did not oversee the cleaning up after the fire, had nothing to do with it, and I don't know about the other barrel that had been sitting out on the platform.

Redirect Examination (T297)

Shortly after I got to the building, there was a terrifically black smoke built up on the north side. When I first went in, there was very little smoke, the building was just churning, black smoke and fire. I saw the fire when I got into the interior of the room. When I tried to get the lift trucks out, it was eating into the middle room then and the smoke was terrific, blinding.

When I arrived at the building, the door to the west was open and the doors to the next two rooms were open, so you could see completely through.

(The noon recess was taken.)

2:00 o'clock p.m., Wednesday, April 28, 1954

After a conference at the bench between Court and counsel, Mr. Williams read the following stipulation to the jury: [88]

"It is stipulated that the product referred to in the complaint as 'Battleship Primer' is made ac-

ording to specifications; that it is a uniform product as shipped by the defendant; and that all barrels of Battleship Primer received by plaintiff, by virtue of the order, Exhibit 12, were uniform as to contents when shipped by defendant."

It was stipulated that Plaintiff's Exhibit 25 for identification is the specifications of the defendant Panther Oil & Grease Manufacturing Company under which this primer in question is manufactured for market, with the exception that the reference to United States Patent No. 23992813 should be eliminated, the jell itself being manufactured pursuant to the patent, but not the primer as a whole.

Plaintiff's Exhibit 25 admitted. (T302)

PLAINTIFF'S EXHIBIT No. 25

"Panther Oil & Grease Mfg. Co. Specifications for Roofing and Waterproofing Asphalt Primer.

"Battleship Asphalt Primer shall consist of an Asphaltic and special waterproofing oils that are manufactured under United States Patent No. 2,392,813, and thinned to a suitable consistency. The Battleship Primer shall also conform to the following Physical and Chemical tests:

	Minimum	Maximum
A. P. I. Gravity at 60°F.....	21.0	23.0
Specific Gravity at 60°F.....	.9100	.9279
Pound Per Gallon at 60°F.....	7.578	7.727
Viscosity S F at 122°F.....	200	240—JMK
Flash Point T. O. C. °F.....	80

	Minimum	Maximum
Distillation Tests		
A. S. T. M. D.-402-36—JMK		
Distillate % by volume to 437°F.....	23.0	30.0
Distillate % by volume to 500°F.....	29.0	36.0
Distillate % by volume to 600°F.....	33.0	40.0
Distillate % by volume to 680°F.....	36.0	44.0

Tests on Residue from Distillation

Softening Point (R & B).....	140	155
Penetration 77°F-100 gm-5 sec.....	30	70
Ducility 77°F-5 cm- min.....	8 minimum	
Ducility 39.2°F-1 cm-min.....	4 minimum	
Oliensis Spot Test.....	Negative	

Battleship Asphalt is resistent to mineral acids, salts, alkalies and other corrosive chemicals.

Resistance to acids:

Battleship Asphalt Primer shall withstand for 6 hours a saturated solution of sulphuric acid, nitric acid, picric acid, hydrochloric acid, hydrofluric acid, alkalies and salts.

Asphalt-Waterproofing Oil Portion. (These specifications required before solvent is added.)

	Minimum	Maximum
Softening Point (Ring & Ball).....	150°F	170°F
Penetration 77°F-100 gm-5 sec.....	30	50
Penetration 32°F-200 gm-60 sec.....	10	----
Penetration 115°F-50 gm.....		90
Ductility 77°F-5 cm-min.....	5	----
Ductility 39.2°F-1 cm-min.....	4	----
Oliensis Spot Test.....	Negative	

Solvent Portion

A. P. I. Gravity at 60°F.....	49.0	51.0
Specific Gravity at 60°F.....	.7753	.7839
Pounds Per Gallon at 60°F.....	6.455	6.526
Initial Boiling Point °F.....	190—JMK	
10% over °F.....	230	
50% over °F.....	290	
90% over °F.....	----	400
End Point.....	----	450—JMK

JOHN C. COOK

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T303)

I reside in Spokane; I am a professional engineer, licensed in Washington and Idaho, licensed in civil engineering. I own and operate the Washington Technical Laboratories here in Spokane, which I purchased in August, 1953. [89]

I received my technical training at the University of Idaho, graduating in June of 1947 with the degree of bachelor of science in civil engineering. My last year in college I had a very light course and I was foreman of the testing laboratory at the University, which is a branch lab of the State Materials Lab of the Idaho Bureau of Highways in Boise, and at that time we were running routine tests on construction materials. In that year, the testing of asphalt materials probably made up at least 10 to 20 per cent of my work. I have had two years of college chemistry.

Following graduation, I went to work for the Idaho Bureau of Highways in the materials testing laboratory in Boise as assistant to the state materials engineer. Upon receiving my license, I was given the title and position of testing engineer in the same laboratory, and was so engaged from 1947 until 1950. We had a regular asphalt department, which I supervised, as well as other departments in

(Testimony of John C. Cook.)

my position as testing engineer for the state. It was my job to oversee the tests to determine the characteristics of these materials and analyze them to see if they met the Idaho specifications as to asphalt road materials. We ran/flash tests, viscosity tests, ductility tests, distillations, penetration of residue, and so on. We also had a few commercial tests on petroleum products, but I don't recall actually testing asphaltic roofing materials in Boise. [92]

Asphaltic road materials and asphaltic roofing materials are both petroleum products and we would run essentially the same tests, except the apparatus might be a little different.

After 1950, I went to work for the Atomic Energy Commission in Idaho Falls in the testing laboratory on the project itself as assistant to the materials engineer; later becoming materials engineer for the AEC in Idaho at its large facility near Arco. There we had complete tests of all the reactor projects, as well as normal housekeeping, buildings, maintenance, performing all the tests incident to those materials, including fuel oils, cutback asphalts and road materials.

From that position, I entered my present business where we are engaged in all types of commercial testing, such as fuel oil, petroleum products, joint sealer compound, another petroleum product, including the same tests I have mentioned.

In September of last year, I went out to the Rosenbaum place and sampled some of the asphaltic

(Testimony of John C. Cook.)

material from a 55-gallon drum which bore a label which stated: "Battleship Primer, Panther Oil & Grease Manufacturing Company." I would say Exhibit 23 is the same as the one I observed on the drum, and I observed no other labels. Prior to obtaining the sample, the bung in the top was tight and I had to [93] use a wrench to open it. There were no other openings in the barrel. At that time, I did not measure the contents of the barrel, but in the last week or 10 days I went out again and found by measurement it was five inches from the top of the barrel to the level of the liquid with the barrel in a vertical position.

I obtained my sample with a three-quarter inch pipe by thrusting the pipe down through the gooey mess. To insure a non-contaminated sample, the outside of the pipe was twice scraped free of the material onto the ground. It took at least a half a dozen dips to fill the one-quart container from the inside of the pipe, after which I placed the lid back on the barrel and the lid on the container and came on back to the lab. At that time, the material was very thick, very viscous, almost in a semi-solid state.

The following day we ran a flash test using a method accepted by the American Society of Testing Materials. There are several methods which can be used, depending upon what flash you think you are going to get. We used the Tag. open cup and the Cleveland open cup to determine the flash.

In making these tests, you take a given quantity

(Testimony of John C. Cook.)

of the material, place it in a container having a mark on it so that you get the same amount each time. In the Tag. test, a small cup is sitting inside another cup with water around the inner cup, eliminating hot spots in the material. [94] You have a check on the temperature while heating by leaving a thermometer immersed in the material but not touching the bottom of the container, as it would be slightly warmer. Then you keep passing a bead of flame of standard size over the surface of the liquid, and when a flash or explosion is seen to occur, you read the temperature and that is called the flash point. The bead of flame is held approximately a quarter of an inch or less above the surface of the liquid in performing this test.

In the Tag. closed cup test, a cover is used and you open the cover just a very minute amount and drop the flame down into that. In that case, a definite explosion is heard, a little "poof," and that is the flash point.

In my experience, I have run hundreds of these flash tests.

When we ran the flash tests of this material in September of 1953, we obtained flash points between 85 and 91 degrees Fahrenheit, which means that at warm room temperature, the material is subject to flash.

Flash point is the temperature at or above which any flammable liquid would be emanating sufficient vapors to be of an explosive mixture when com-

(Testimony of John C. Cook.)

bined with the surrounding air if there was a flash or a flame to ignite it.

Materials of low flash point are hazardous because if a person didn't know of this condition and was smoking [95] around them or happened to drop a hot spark in them, with these vapors coming off, you would get an explosion, or a fire, certainly. If the heat were sufficient, it would ignite these vapors without a spark being present if they were at the proper condition. The vapors are not necessarily right at the material. In the Cleveland open cup test, the vapors are up above the cup when you ignite and you are not igniting the material, you are igniting the vapors.

This means that when exposed to the surrounding atmosphere, this material at any temperature above 85 to 90 degrees Fahrenheit, is giving off vapors capable of causing an explosion.

There is a wide range of flash points in petroleum products. Most oils have higher flash points than the material in question.

I ran three tests with the closed cup method and two with the Cleveland open cup, and my chemist ran two with the Cleveland open cup, the range of flash points being between 85 and 91 degrees.

As previously mentioned, I obtained a further sample from this same barrel within the last week or ten days, at which time the bung was in tightly and it was pretty well sealed with material around the bung. We sampled in the same maner as before, using a clean aluminum tube, and obtained four

(Testimony of John C. Cook.)

quart samples. We ran further flash tests on [96] these samples, as well as tests requested on a portion obtained from distillation. On tests of the entire mixture, we obtained flash points ranging from 81 to 91 degrees, using the Tag. and Cleveland open cup methods. We then distilled off the solvent in the primer, which would be any material which would be used to cut back your material or bring it to a liquid form at which it could be used, and obtained a flash point of 57 degrees Fahrenheit from the distillate.

In sampling this material on these occasions, I did not detect the presence of any water. I believe I would have detected the presence of water had there been any present.

Cross Examination (T321)

All asphalts are derived from crude oil in the first instance through distillation at the refinery. They are the jell or residuum left over after the more volatile portions of the crude oil have been distilled off. The distillates thus taken off can be sold under a variety of titles, some being within the flash points of naphtha, some in the flash points of kerosene, depending upon what the refiner wants to obtain as to how the distillates that come from the crude oil are rearranged.

The asphalt in this form would be too thick and viscous for use as a roofing primer. [97]

Essentially, I would agree that a satisfactory roofing primer should have these characteristics:

(Testimony of John C. Cook.)

Flowability or brushability, or the ability to spread easily; a degree of penetrability so that it will be absorbed into the material on the roof; and ductility, so that it will not crack and fracture and break apart in cold weather. Without a solvent, asphalt would not have these characteristics, so that certain of the essences which have been distilled off from the crude oil are used to cut back this material.

My experience prior to conducting these tests has been with paving asphalts, but petroleum products have standard tests.

The desirable characteristics of a roofing primer can only be obtained through the use of a solvent. It is not true, however, that in order to make the product usable, it is necessary to make it hazardous.

I am vaguely familiar with the fact that the Interstate Commerce Commission has regulations governing the shipment of petroleum products.

(An objection was made to further inquiry relating to I.C.C. regulations on the ground they are solely concerned with hazards in transit, not the hazard to an ultimate consumer; overruled.) (T327-329)

I am not familiar with the fact that the I.C.C. has established three general classifications of materials: [98] those with flash points below 20 degrees Fahrenheit; those with flash points between 20 and 80 degrees; and those with flash points above 80 degrees. I am not a transportation engineer. I know that certain petroleum products with very low flash points carry red warning labels; that there are

(Testimony of John C. Cook.)

warning labels on other such products having flash points between 20 and 80 degrees Fahrenheit. I have seen warning labels on road oil shipped from Utah to Idaho which had a minimum flash point of 80 degrees.

(Objection was renewed to the line of inquiry. A discussion was had in the absence of the jury between Court and counsel, in which plaintiff contended that: the I.C.C. regulations, being the best evidence, should be offered and ruled upon; that the said regulations were intended to establish safety standards only as to transportation of hazardous materials, not having any bearing upon the duty owed by a manufacturer to a consumer; that they were designed to protect the instrumentalities of commerce; that the manufacturer had a positive duty to warn a consumer of the hazards of an inherently dangerous material; that a state statute covering the sale or shipment of such a material was being violated by the defendant; that this inquiry exceeded the scope of the direct examination.

The defendant urged that: an interstate shipment was involved; that I.C.C. regulations furnish the only [99] known standards in the industry; that the indiscriminate use of warning labels would defeat its own purpose; that compliance with the said regulations would not furnish a complete defense to the action, but should be considered by the jury as affecting the burden of proof of the defendant; that the standards contained in the I.C.C. regulations are recognized by all common carriers; that the

(Testimony of John C. Cook.)

state statute referred to is in direct conflict with the scope of the Act of Congress and I.C.C. regulations enacted pursuant thereto and has been superseded by the said act.

The Court ruled the I.C.C. regulations to be immaterial and that the inquiry went beyond the scope of the direct examination.) (T330-344)

On motion, the jury was instructed to disregard all reference to I.C.C. regulations and the matter was stricken.

The bases for fixing standards for flash point tests are fixed by the American Society for Testing Materials, referred to as A.S.T.M., and also the American Association of State Highway Officials. The tests must be carried out very exactly as to procedure and equipment. In the Tag. open cut test, the dimension of the container, the thickness of it, are fixed exactly.

The distance of the flame from the bottom of the [100] container may be varied to adjust the rate of rise of temperature of the material being tested. Essentially, it is correct that the A.S.T.M. specifies just how far the jet flame must be below the bottom of the container by giving a diagram of the equipment. They also specify just how high the material must come in the cup. The distance of the flame above the material is fixed both by dimension and by the manufacturer of the equipment. I don't know exactly whether the standard in the Tag. test is a quarter of an inch or one-eighth of an inch. The standard is not an approximation, but an exact

(Testimony of John C. Cook.)

measurement. We removed the equipment in our tests and placed the flame anywhere we wished and found very little variation in the flash point.

If you held the flame an inch above the material, it probably would change the flash point in the Tag. open cup test, but not in the Tag closed cup method. Any deviation from prescribed procedures would not result in a standard test.

The flash points I obtained do not refer to the temperature of the atmosphere, but to the temperature of the material itself, as reflected by the thermometer in the material at the time the flash occurs.

If the room temperature were at the flash point of the material or above, while the surface of the material was 15 degrees below that point, it would not flash, though [101] I can't conceive of that condition. A viscous material, such as this primer, responds slowly to outside temperatures.

(An objection was made to reference to the instructions contained in Exhibit 14 as not pertaining to the primer in question; overruled as being a question for the jury.) (T354-355)

I suppose an instruction that it took 72 hours to warm this material after becoming chilled would be an indication that it was slow in achieving room temperature.

I checked the quantity of material taken from the barrel on the Rosenbaum place on April 16th. I testified on deposition on April 15 that on September 5, 1953 when I was out there, the barrel was "about" or "approximately" two-thirds full and

(Testimony of John C. Cook.)

that the material was down about a foot from the top of the container. The other day I found it to be exactly five inches.

I have not made a viscosity test at any time of this material.

I first took the flash point of the primer and found it had a range from 81 to 91. I then raised the material to a certain temperature and obtained a distillate of 30 per cent from a 200 c.c. sample, on which the flash point was 71 degrees. We made the distillation twice in order to obtain enough material to run the flash test. The [102] 57 degree flash point was of the 10 per cent portion.

Presumably, if you distilled a gallon of beer, you would get 4 or 5 per cent alcohol by volume, and a flash test of the latter would indicate the flash point of alcohol, and not of the beer, but the corollary escapes me somewhat. This primer, being a mixture of an asphaltic and a cutback, the lighter fractions come off as that material heats up and you get a lower flash point on those fractions.

We went up to a temperature of 437 degrees in our distillation of the solvent portion to derive 30 per cent by volume. The first amount of distillate was obtained at 368 degrees, but it was coming off all the time and we were running it at a 10 per cent point. It was from the distillate itself that reflected the lower flash test.

It is true that practically every ingredient derived from crude oil, if handled in the same way, will produce essences which are very much lower

(Testimony of John C. Cook.)

than the flash point of the essence as a whole, the material as a whole. We were attempting to determine the type of solvent and its flash point. In determining the hazard involved, the flash point of the mixture as an entity is used.

Defendant's Exhibit 26 for identification is a photostatic copy of reports from my laboratory, plus a report from the Idaho College of Engineering. When I came into possession of the laboratory, I found a record there of the [103] former owner reflecting a former sampling of this primer on about July 27, 1953, and indicating a flash point of less than 90 degrees and a fire point at 95 degrees, and that was all he showed.

My first test on September 5th showed a flash point of 95 degrees and a fire point of 100 degrees; Test No. 2 showed a flash point of 91 degrees and fire point of 99 degrees.

On September 12th I took a sample of the material to the University of Idaho at Moscow, and they showed a flash point of 85 degrees and a fire point of 100 degrees.

None of the tests shown in Exhibit 26 are of the distillate. Testing of the distillate is not a customary practice, but we were not working with a customary product. At the University of Idaho it was assumed this material would meet some sort of specifications, so the A.S.T.M. specifications were used and the material was found to be completely out of that.

(Testimony of John C. Cook.)

I am not familiar with the 5th edition of "Asphalts and Allied Substances" by Abraham.

I don't know that this is a rapid-curing cutback we are dealing with in this primer. I don't know what it is. We used the specification that applied to a roof primer, as such. The title of the specification we used was not that of a primer for controlling dampness on concrete. [104]

Defendant's Exhibit 26 admitted. (T367)

(Results of tests by University of Idaho contained in Exhibit 26 read to jury by counsel for plaintiff.)

Redirect Examination (T368)

The former owner of my business is no longer engaged as a testing engineer. That is the reason I was asked in September to obtain a further sample.

There are many solvents which could be used in this primer having flash points from 100 to 130 degrees, which would certainly render the material less dangerous to use. These solvents would be just as satisfactory as the solvent used in this primer. They are probably a little higher in price.

The last tests I made in April were conducted at the University of Idaho laboratory.

Recross Examination (T370)

Stoddard solvent has a flash point of around 130 degrees. The highest flash I obtained from the solvent in this primer was 79 degrees.

(Testimony of John C. Cook.)

Redirect Examination (T371)

By using a solvent with a flash point of 130 degrees, the flash point of the entire mixture would be well above 130 degrees, as the lowest flashing matter is the [105] solvent.

JAMES G. McGIVERN

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination (T371)

I am James G. McGivern; I reside in Spokane; I am Dean of the School of Engineering at Gonzaga University, and have been for 15 years. I hold a bachelor of mechanical engineering degree from Northeastern University; a master of arts degree in mathematics and physics from Boston University; a master of science degree from Harvard University in mechanical engineering, and did research work at Harvard for 2 years following my degree in mechanical engineering. I have had 2 years of general college chemistry, then I took physical chemistry, and then I took considerable thermo-dynamics. I had a whole course in the testing of fuels and lubricants and am acquainted with the various standard tests.

I left Harvard in 1934 and taught mechanical engineering at Washington State College from 1934 to 1939 and was a member of the Engineering and Experiment Station where we did research work on magnesium alloys and effect of shape of shaft-

(Testimony of James G. McGivern.)

ing, ability to withstand loads. At Gonzaga, I have jurisdiction over the chemical, electrical, civil and mechanical engineering courses. I supervise the testing [106] laboratory in fuels and lubrication, in addition to another testing laboratory for the strength of machine parts, and am familiar with most of the processes involved. I have tested many petroleum products and am familiar with their characteristics.

I am also a member of the State Engineering Board of Examiners and I do consulting work on the side and have for the last 15 years.

On March 24th of this year, I obtained a sample of the material from the drum on the Rosenbaum place, which was sealed so that it was necessary to use a wrench in opening it. There was a label on the barrel which wasn't too easy to read. For all practical purposes, Exhibit 23 is the same as the label on the barrel. I think it is the same.

I had a special sampling cup and I took a sample first from the top part of the drum, then from the center part, then from the bottom part, and in all I took out about a gallon of this substance, which took about three-fourths of an hour to accomplish. I believe I obtained a representative sample of the material. We then tightened the plug on the drum, I sealed my container, and took the gallon sample to the laboratory at Gonzaga for testing.

The first test I made was to determine the flowing characteristics of the primer or its viscosity. At 122 [107] degrees Fahrenheit, I found it took about

(Testimony of James G. McGivern.)

1100 seconds for the given amount of material to flow through this small tube, which is a standard testing device. The standard A.S.T.M. specification calls for it to go through this device in 150 to 225 seconds at 77 degrees Fahrenheit, but in my opinion this material would not have been capable of passing through the device at that temperature. Exhibit 25, the defendant's specification, calls for a viscosity S F at 122 degrees of 200 minimum to 240 maximum seconds. It would take five times as long for this material to go through as the specification calls for.

The sample I obtained was a semi-solid, a very heavy, viscous material. It was necessary to scoop it out of the sampling device, place it on the side of the container and let it drop down inside. In my opinion, I do not believe it could have been brushed on a roof at any temperature below 100 degrees Fahrenheit; it would have to be 160 degrees.

The material I got from the drum is a mixture, not a compound. If it were a pure substance, it would have a constant boiling point and it would have a flash point that would be typical of that substance; whereas, this material contains many of the hydrocarbons from the crude that have been distilled out at various temperatures and mixed together, and each one has its own properties. A mixture is a [108] combination of materials that can be separated without chemical means; in this case, just by heating it.

I ran a flash test of the entire mixture using the

(Testimony of James G. McGivern.)

Cleveland open cup method and obtained a flash point of 83 degrees Fahrenheit. Flash point is the temperature of the liquid when the vapors immediately over it, due to that temperature, are at an explosive mixture with the air, at or above that temperature. This means that any time this material is above its flash point, there are vapors immediately over it that, if ignited, could explode.

I have handled a considerable number of inflammable fluids and in my consulting work am brought in contact with industry and the handling of flammable fluids and substances. I think it is normal custom in industry that any material with a flash point under 100 degrees is considered dangerous, and any material between 100 and 150 should also be so labeled. The custom of prudent manufacturers is to use a red danger label on materials with a flash point of 100 degrees Fahrenheit. As to those between 100 and 150, the custom is to label "Do Not Heat; Do Not Have Near a Fire," general precautionary measures. Below 100, they are dangerous, actually dangerous, and a red label "Dangerous, Do Not Heat" is used.

I ran three or four flash tests and obtained substantially 83 degrees Fahrenheit in each one as an average [109] value.

I next ran a distillation test on the whole primer as I was interested in trying to determine the characteristics of the solvent employed and also to see if the primer itself met the A.S.T.M. specifications. Using the standard A.S.T.M. method, we took some

(Testimony of James G. McGivern.)

of the primer and put it in the flask and heated it and that boiled off. We then took the distilled vapors and put them through coils that ran through cold water and obtained the amount of this solvent that came off at the corresponding temperatures, which we did for the complete sample. At 437 degrees, we obtained 24 per cent solvent. Solvent is a material that will dissolve the heavy material to make it less viscous and which, after the material has been placed in position, will evaporate off and leave the material that you want as a weather coating remaining.

The solvent I obtained through distillation was less than that specified by A.S.T.M. for that temperature. I gave that a distillation test similar to what we give for gasolines, naphthas and kerosenes, and I found that the distillation curve obtained corresponded very closely to a gasoline.

I obtained the specific gravity of the whole solvent and then the specific gravity of the parts of the solvent as we distilled it off progressively. The first [110] part that distilled off had a specific gravity of .73.

Specific gravity means weight. Using water as 1, it means for an equal volume this would weigh .73 of the same volume of water. For the complete solvent, the specific gravity was .77.

The first part of the solvent distilled off, which corresponded to 5 per cent of the total primer that we used, the flash point was minus 24 degrees; the

(Testimony of James G. McGivern.)

second 5 per cent was 54 degrees; and it progressed somewhat above that.

From the various tests I conducted, in my judgment, the solvent has all the characteristics of a gasoline and, in my professional opinion, I would say it was gasoline.

There are many purposes of flash point, one of which is to sort of classify a material for transportation purposes, as has been brought out here. Actually, the flash point of a mixture of a combination of materials doesn't necessarily tell you the worst story; it is one measure of its hazard. The whole story of the hazard of this primer is the light products, the gasoline products, that are in it. When they mix with air to a percentage of about 11½ per cent vapor to air, they are explosive, and, if ignited, will not burn but will ignite instantaneously, which is termed an explosion.

I would say that this material is more hazardous than its flash points would indicate, because of the [111] distillation curve of the solvent and the flash point of its parts. This is a mixture and the danger of it is its weakest part, and the part that gets into the air actually is the light part. The part that remains in the primer is of no danger as long as it is in the primer.

From my sampling and handling of this material, I do not believe there was any water present in it.

In my opinion, there would be no difference in the results of tests on this material on July 8, 1953, at the time of the fire, and at the time my tests

(Testimony of James G. McGivern.)

were made, it being closed all the time. If the drum had not been closed, some of the lighter material would have evaporated off and its flash point would probably have been higher, indicating less hazard after exposure.

Cross Examination (T391)

I don't know what this barrel might have been exposed to between July 8, 1953 and March 24, 1954. If the material had been exposed for a couple of hours within a few feet of the burning building and had attained a temperature beyond 600 degrees, it might produce a change, a cracking. I would expect that.

Cracking is the breaking down of the heavier molecule to make a lighter molecule out of it through the use of heat and pressure.

If water had been in the barrel for a period of [112] months, I would expect it to be there in droplet form, I wouldn't expect it to be in solution. The presence of water would have no effect on our viscosity tests, as we took our tests at higher temperatures and the water would have changed to steam, it wouldn't have been in the material anyway.

The flash points I obtained ranged from 82 to 84. Testing techniques would probably account for differences in flash tests. We took our sample right from the container and put it immediately into the cup and made our tests as quickly as possible. If it is left any time at all, some of the light ends might

(Testimony of James G. McGivern.)

be lost. Without a difference in testing techniques and unless something had happened in the interim, I would expect, if the barrel had been open, to have the flash point going up, rather than going down.

On my deposition the other day, I stated it was my opinion when I examined the drum on the 24th of March that the level was 9 inches from the top. After being informed Mr. Cook thought it was 15, I moved down to 15. I have since talked with Mr. Cook and I think now I will go up the same distance I went down, and I will be about 5 inches. We had to turn the barrel a little bit at an angle to pull this thing out, and it was an approximation. I am revising my estimate in the light of the measurement Mr. Cook made.

The difference in flash points obtained shortly after the fire of from 91 to 95 and my average value of 83 [113] in March of 1954, I think is accounted for, as I just tried to explain, by sampling technique. We are testing that first vapor that comes off at that temperature of the explosive mixture, a very small part of the total sample, and, if we are not measuring that same vapor, through some means it could evaporate off, there could be quite a difference.

Had the barrel been open, you would have a skin on the top similar to on your paint pail, and you don't get much evaporation after that first oxidation is formed. If the barrel had, in fact, been a third empty, as Mr. Cook first estimated, there would be no tendency for evaporation to occur, be-

(Testimony of James G. McGivern.)

cause that is still air in there and it is closed. You need circulation of air to get evaporation. All you do is saturate the small amount of air that is present.

Had the barrel been a third empty in September and gasoline later added so it was 5 inches from the top when I took my sample and made tests in March, we certainly wouldn't have had that viscosity and our distillation curves wouldn't be as they are. I have only 24 per cent of the solvent at 430 degrees. If they had added one-third more gasoline, I would have all that in addition. I don't think that adequately explains the difference in flash points obtained; I think it is close enough to be within the experimental technique. [114]

I am just conjecturing, of course, because I don't know what happened to the material between September and March.

The specifications I used for contrast purposes for the primer, but not the solvent, are A.S.T.M. designation D-41 issued in 1941. There is, however, a newer one issued in 1948. The specifications I used state:

"These specifications cover asphaltic primer for use when specified with asphalt in dampproofing and waterproofing below or above ground level for application to concrete masonry surfaces."

It is not like comparing apples and oranges, as this is a test for an asphaltic cutback. It is not used exclusively on masonry walls. I have checked with three roofers and common practice dictates it

(Testimony of James G. McGivern.)

has been used for roofing. The main reason it is used for concrete is the fact that the hot asphalt does not bind with the concrete. This is a prime coating on concrete, on which they may put the other if they so desire.

I don't know specifically that warning labels are not used on materials with a flash point of less than 100 degrees by Standard Oil of California, Standard Oil of Indiana, or Associated Gas.

I have heard of Dr. Abraham, but am not familiar with his book on asphalt and don't know that he fixes a [115] standard of a rapid-curing cutback at 80 degrees Fahrenheit Tag. open cup. If that is the case, I think people should be warned. I do not recognize Dr. Abraham as the standard authority on the subject.

(Discussion before the bench between Court and Counsel out of hearing of jury, in which Mr. Graves stated he felt the witness had opened the matter of the I.C.C. regulations and similar regulations; that an offer of proof would be made if the matter were ruled out. The same ruling was made by the Court. Preliminary examination as follows:)

I consider the man at Illinois Institute of Technology, I believe his name is Tichenov, to be the standard authority on this subject. He has done great amount of research on petroleum products and has published original papers. I cannot refer you to any data in which he fixes the standard for rapid-curing cutback asphalts, nor do I have that available to me.

(Testimony of James G. McGivern.)

(Objection to question as to whether the witness knew manufacturers of petroleum products pay close attention to I.C.C. regulations for shipment of combustible liquids; overruled). (T407)

I know by hearsay. I was just here when the jury was dismissed and there was quite a long discussion on it. I have heard something about it generally, but am not an authority on it. I do not know that they pay close [116] attention to regulations fixed by postal authorities for shipment of combustible liquids both by ground and airmail, nor do I specifically know of the regulations of the Coast Guard pertaining to shipments of same matter by marine vessels.

(Objections to questions concerning witness' knowledge of postal and Coast Guard regulations; overruled.) (T408)

I believe there is a distinction between the requirements for safety with respect to a drum that is closed and to be carried in transit, as against the safety characteristics of a user in the application of that particular commodity. The I.C.C., as I understand it, is interested in the regulations that would make for safe transportation of the product.

(Objection to inquiry as to whether witness knew ICC regulations require certain type of label on containers where the flash point of the material is 20 degrees or less; sustained. Jury excused for day and discussion followed between Court and counsel in which defendant contended: Witness attempted to qualify himself as expert on labeling practices

(Testimony of James G. McGivern.)

of the liquid in the barrel, I was approximating from my memory and I so stated. [119]

(Objection to the question: "You have testified that prudent manufacturers place red dangerous or warning labels on petroleum products having flash points below 100 degrees Fahrenheit. Why, if you know, do prudent manufacturers do that?" as calling for a conclusion as to state of mind of manufacturers, not specifying the manufacturers, use of product or flash point, highly conjectural; overruled.) (T421-422)

Under normal atmospheric conditions, a material with a flash point below 100 degrees, in all probability, would have a flash point lower than the atmospheric condition and thus vapors would be evolving from the top and filling the enclosed space and therefore be subject to explosive conditions. The 100 degree breaking-off point is by reason of the fact that there may normally be atmospheric temperatures to that range.

In my opinion, it was not necessary for the manufacturer of this primer to have used a solvent with such a low flash point. A naphtha could have been selected with a small difference between the boiling point and end point, which would have resulted in the flash point of the entire mixture being over 100 degrees.

Recross Examination

(T424)

In the Cleveland open cut method of testing which I employed, the thermometer is inserted sub-

(Testimony of James G. McGivern.)

stantially to [120] the bottom of the cup, which would reflect the average temperature of the material being tested, and the reading thus taken determines the flash point.

Had the three barrels of primer on the loading platform had their bungs taken out to speed the warming process, they would not have bulged if exposed to heat as I have indicated.

J. M. KNISELEY

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

(T426)

My name is J. M. Kniseley; I reside at North Bend, Washington, near Seattle, and have resided in that vicinity for about 50 years. I am a professional chemical engineer in and around Seattle and have been about 28 years. I have my own office, which is known as the J. M. Kniseley Engineering Company.

I received my professional training at the University of Washington, graduating in 1926 with a bachelor of science degree in chemical engineering. Upon graduation, I was employed by Laucks Laboratories, Incorporated, an organization of commercial chemists and chemical engineers, with whom I was associated until 1949. I started out as a chemist and ultimately became manager and vice-president of the company and also president

(Testimony of J. M. Kniseley.)

of Laucks Chemical Company, [121] an associated company. We normally operated with from 20 to 26 employees, 15 to 18 of whom were trained personnel. The firm afforded technical service for industry located around Seattle, the shipping and manufacturing industry.

All during this period of employment, I had continual experience in testing road oils and applied asphalts and roofings and other types of asphaltic materials. Early in my technical career, I obtained a Certified Marine Chemist's Certificate, which is issued by the American Bureau of Shipping. The purpose of this was to service the shipping industry so that vessels undergoing repair might safely use welding and burning equipment in their petroleum tanks. I was the first in the organization to obtain this certificate and it became more or less my specialty and I still carry that certificate.

While it is called a Certified Marine Chemist's Certificate, it is recognized all over the country as the proper qualifications for testing for explosive conditions and is used on shore plants, as well. If a fabricator employs the holder of such a certificate, that is recognized as due precaution and he is excused from being accused of negligence. Many times I have been employed to determine the cause of industrial explosions, and have had more experience than anyone else in the Seattle area in this field. I belong to all the professional societies that are associated [122] with my particular lines of work. I think I am thoroughly familiar with the testing

(Testimony of J. M. Kniseley.)

of asphalt materials to determine their various characteristics.

Pursuant to request, I obtained a sample of the material from a drum on the Rhea Rosenbaum place in November of 1953. The barrel from which I obtained the same was a 55-gallon drum bearing a label stating "Battleship Primer" and "Panther Oil & Grease Company," with a picture of a battleship, being the same label as Exhibit No. 23. The barrel was intact, apparently having had no damage, was clean, was not bulged or wrinkled, which I particularly observed because I knew it had been involved in this fire. The bung was very tight which I opened, as well as the smaller three-quarter inch one which I thought at first I might use. The label had a couple of scratches on it, but no evidence of scorching whatsoever. When I withdrew my sample in November, 1953, I measured the level of the material with my finger and am certain it was between four and five inches from the top. I always note the level of a material in a container, because in the gauging business quantity is just as important as quality. Normally, a 55-gallon drum of asphaltic material is not filled to the top, because a slight temperature change would cause them to bulge and leak. This barrel was of about average level, maybe just half an inch or so down. [123]

I obtained a sample of just under a gallon with a piece of equipment called a trier, which tends to cut a core out of the material. I was able to obtain a large quantity at each thrust, but had to scrape it

(Testimony of J. M. Kniseley.)

off into my gallon can because it was a paste, practically a solid. From my observation of this material at the time, I would say it wasn't brushable at all under normal conditions. I was very careful in obtaining my sample to thrust the trier in at as many angles and depths as possible so as to obtain a representative cross-section of the material. I think I replaced the rubber gasket in the bung and put the bung back in tightly.

I then took the sample to Seattle and performed tests for flash, viscosity, solubility in carbon bisulphite, distilled off the solvent material, and tested for penetration of residue after the distillation. I found the viscosity much too high, it requiring approximately 1100 seconds to flow through a standard orifice; the solvent content was 31 per cent; penetration of solids after the solvent was removed was 36 units using a standard test; and the amount soluble in carbon bisulphite was practically complete, being 99 per cent. Using the Cleveland open cup method, I obtained a flash point of 91 degrees.

I employed a standard test method in the distillation and noticed the presence of extremely volatile vapors as soon as I started to distill this material. Those [124] volatile vapors are hazardous, inflammable, and it is the ease with which they come off that largely measures the danger involved in handling, and I was surprised at the ease with which they came off.

(Objection to state of mind; question rephrased.)
(T440)

(Testimony of J. M. Kniseley.)

The first vapors came off much earlier in the distillation than normally would be expected, and my conclusion was that the material contained an extremely volatile solvent. I suspected it might be what is normally described as gasoline. "Volatile" is the term for the ease with which anything may be boiled. Gasoline starts to boil at less than a fifth the heat required for water and starts to boil at a low temperature. All liquids give off vapors, even at normal temperatures, and not merely at their boiling points. Boiling point is the point at which the vapor pressure reaches the air pressure and a liquid is vaporizing freely.

I then subjected the primer to a normal test for gasoline, a dilution test, which we use for determining gasoline in crankcase oil. I used the standard dilution equipment for lubricating oils and found there was gasoline present. I then enlarged the scale of the test and actually recovered quantities of this gasoline, which I verified by running a distillation test on the material, and found it had the properties and characteristics of gasoline.

I am familiar with the distillation characteristics of the various grades of gasoline and other solvents and petroleum products. The materials that distill over at low temperatures are the prime offenders in explosions and fires.

I actually recovered 8 per cent of the primer as gasoline, which was not a complete recovery due to difficulties encountered in the testing procedure.

Flash point is the temperature at which a mate-

(Testimony of J. M. Kniseley.)

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I actually recovered 8 per cent of the primer as gasoline, which was not a complete recovery due to difficulties encountered in the testing procedure.

Flash point is the temperature at which a mate-

(Testimony of J. M. Kniseley.)

rial gives off inflammable vapors in such quantity to cause an explosion. Therefore, at or above 91 degrees Fahrenheit, or whatever the actual flash point is, this material, when exposed, would give off sufficient vapors to form an explosive mixture with the surrounding air. Depending on the air currents, it would be difficult to tell where these vapors would be. They are quite inclined to form pockets. Under proper circumstances, they have been known to fill an entire room. There are innumerable things which will cause an explosion once the vapors have formed an explosive mixture, such as a slight spark, flame, or even being exposed to a hot wire. In the case of this material, flash point is not the whole story of the hazard, because the material contained this gasoline which, when vaporized, was just as dangerous as any gasoline could be. At temperatures slightly above its flash point, the volatile vapors came off much more rapidly than normal. [126]

This primer is a mixture. In terms of hazard of a mixture, it is the character of the light, volatile material that determines the true hazard. Mixtures having solvents with extremely volatile characteristics or low flash points below that of the entire mass have caused trouble ever since these petroleum products have been in general use. It is the presence of the light, volatile material in industrial products that has caused the fires and explosions, and to a large extent they have been removed from practically all of the materials that are offered for

(Testimony of J. M. Kniseley.)

sale in normal commerce. In this material, the highly volatile parts had not been removed.

I believe this material to be more hazardous than the flash point itself would indicate.

Plaintiff's Exhibit 27 for identification is a graph prepared by me showing the distillation curve or rate of distillation of the gasoline extracted from the primer and various other substances. I employed a steam distillation process so that the material was not subjected to a temperature higher than 212 degrees.

Rate of distillation is the best measure of hazard of a flammable material in terms of use in the open. The purpose of steam distillation is to remove unaltered those portions mixed with a heavy material which might be altered by temperatures necessary to remove them, and I obtained the [127] gasoline solvent unaltered.

Plaintiff's Exhibit 27 admitted. (T452)

On Exhibit 27, I laid out scales from zero per cent to 100 per cent and zero up to 500 degrees Fahrenheit. In carrying out the distillation, we have the material in the flask, we heat it, it distills over through a condenser and collects into a graduated tube. When the tube reached 10 per cent, on up, we make the reading of the temperature and write it down. This curve, then, is just the temperature at which these various percentages have been distilled off. Aviation gasoline, for example, at 360 degrees approximately 90 per cent of it was distilled. In each instance, the curve is an exact

(Testimony of J. M. Kniseley.)

measure of the volatility of the material indicated, the lower curves being the more highly volatile. The more volatile a material is, the lower it boils and the easier it is to create a hazardous condition.

The lower two curves on the exhibit are two grades of aviation gasoline. There are petroleum products more volatile than aviation gasoline, but it is, I believe, the most hazardous normally circulated in commerce. The red line on the graph represents the material I extracted from the primer, and just above that the next two lines are ordinary grades of gasoline used in automobiles. Above those is the material used by dry cleaners or cleaner's naphtha. Next is [128] Stoddard Solvent, which has become known in the industry as a solvent which can be used safely in compounding different materials requiring solvents to avoid the presence of these volatile materials that create the hazardous conditions. And then kerosene is what the old-timers used to burn in lamps and is considered normally safe in a household.

The flat lines on the graph are quite significant in that they indicate material that distills off in a narrow range. Until you reach a certain temperature, you are practically free from these dangerous materials. The materials with steep curves start giving them off at very low temperatures and practically at room temperature.

From my experience in testing and compounding roof primer, and also in a consulting capacity, it is my opinion it was not necessary that the mate-

(Testimony of J. M. Kniseley.)

rial shown by the red line on Exhibit 27 be used to make a satisfactory roofing primer. Stoddard Solvent would have obtained just as satisfactory results. Stoddard Solvent is a class and they generally flash above 100 degrees Fahrenheit, up to 130 degrees. If one of these had been used with a flash point of 130 degrees, it would have resulted in a primer having a flash point higher than the solvent due to the retarding effect of the asphalt. Stoddard Solvent is a premium solvent and costs more than the material used in this primer.

Once the primer in question is above its flash [129] point, it is as dangerous as gasoline in terms of hazard of flash fire or explosion. Pound for pound, gasoline has a greater boosting power than dynamite, and, under certain circumstances, gasoline vapors are considerably more easily set off than dynamite and have the additional hazard of being invisible and practically odorless.

In my experience, I have been intimately acquainted with various manufacturers of petroleum products, roofing materials and asphaltic compounds, and am familiar with their trade practices. 100 degrees Fahrenheit has been accepted as the breaking point where material is considered hazardous among prudent manufacturers of this type of material. It is the custom among prudent manufacturers to label materials with flash points below 100 degrees with red warning labels; from 100 to 150, usually there is a warning phrase in red in distinctive printing warning against the

(Testimony of J. M. Kniseley.)

danger of fire. Generally, these labels state: "Do Not Heat, Do Not Get Close to Open Flame," to use in well-ventilated room.

The practice of labeling in this manner is necessary to warn the consumer of the hazard if the material is to be standing around or used above its flash point. Where warning labels have not been used on such materials, the experience has been very bad. There have been fire and explosions and injuries.

This primer as a whole is more dangerous than some of the straight naphthas. [130]

(Motion to strike answer on ground there is apparently a wide range of naphthas; Court ruled answer should be more specific.) (T462)

Naphtha covers a range of petroleum and there are various types in terms of hazard.

(Objection to the question: "How does this material compare in terms of danger with what is commonly called Naphtha?" unless the range of naphtha is established.) (T462-463)

Voir Dire Examination

To my knowledge, the lowest flash point of any type of naphtha is below zero and the highest about 140 degrees.

(Objection renewed; overruled.) (T463)

This entire primer is more dangerous than some naphthas.

I have heard the evidence as to how this primer was heated for application, and I don't think the

(Testimony of J. M. Kniseley.)

method of heating was so important, the heating was the fault.

From my observation of this material and from my viscosity tests, it is my opinion it would have to have been well over 100 degrees Fahrenheit, or well above its flash point, before it could have been brushed on a roof.

I did not detect any water present in the material in my testing, and I believe I would have detected it had it [131] present.

I think there would not have been any significant change in the primer between July 8, 1953 and when I tested it some five or six months later. Had the cap been off the barrel for a period of time, it would have made the flash point higher in my tests and would have appeared less hazardous.

(Objection to question: If material had been kept for period of 3 months in a room in the warehouse previously maintained at 32 degrees by refrigeration, but the refrigeration equipment having been inoperative during this 3-month period, in your opinion, what would have been the temperature in that room? unless outside temperatures were shown; objection sustained.) (T466)

(Objection to question: "How long, in your opinion, would it take for the temperature in that room, after the refrigeration was shut off, to normalize with the outside temperature?" on grounds room was insulated, no showing of average outside temperatures, the information being available through Weather Bureau; overruled.) (T466-467)

(Testimony of J. M. Kniseley.)

I think it would normalize in about five to ten days. Following that, the temperature would reach some average halfway between night and day temperatures.

The fact that the manufacturer's specifications permitted a flash point of 80 degrees in the mixing of this [132] material would indicate they wanted to use materials of low flash.

Since I was able to extract at least 8 per cent of this primer as gasoline, there would be roughly 5 gallons of gasoline contained in a 55-gallon drum of this material.

(Objections were sustained to questions as to the explosive power and danger represented by the 5 gallons of gasoline.) (T468-469)

Cross Examination

(T469)

I have a record of the tests which I made and you may have it. I don't have the notebook in which I made notations while conducting the tests. I didn't make any distillation curve of the primer itself, but merely distilled to these two temperatures and recorded the percentages.

I used for comparison the same A.S.T.M. specifications which Mr. McGivern testified yesterday he used, being for an asphaltic primer used for roofing and moisture-proofing on concrete and mason work.

A good roofing primer is used to form a bond between the roof and the covering. Penetration

(Testimony of J. M. Kniseley.)

and adhesion are two different things. At least, it must have adhesion to the roof itself; whether it is necessary for the primer to penetrate, I don't know. Many primers are used on metal where they don't penetrate at all, but they do adhere. [133]

In the open cup tests for flash point, there is a variation accepted and permitted in the industry, depending entirely on the material and the temperature at which the flash occurs. As to the tests I run on the roofing primer, I don't know to the degree the variation that is permitted, but I would imagine about 5 degrees, maybe 10, depending on the temperature at which it flashed.

I have heard of Mr. Abraham, but I don't claim to be familiar with his publication, "Asphalts and Allied Substances." I don't know that I have any other work which I consider more authoritative than his book. I have used various handbooks, and so on. Largely, my work has been actually comparing materials themselves. I have had to depend on what I could do with them and what can be made out of the end product.

I do a good deal of work investigating fires and testifying as to the cause of those fires. I am not on the witness stand a great part of my time. That would be a life that nobody would live.

The A.S.T.M. does permit certain very minor variations in testing through open cup tests and those are fixed by the Society itself. That information can be derived as to permitted variations and I will try to have it this afternoon. It is not true

(Testimony of J. M. Kniseley.)

that variations between 91 and 95 degrees flash point on the one hand and 83 on the other is way [134] beyond any variation permitted if the tests are properly conducted.

In determining whether or not a proper roofing primer had been manufactured from the standpoint of safety, you would have to know more about the solvent than what you would learn from the simple distillation of the primer itself. Actually, the gravity of the solvent portion has only a very indefinite relation to the safety, but a specific gravity of .8 at 60 degrees Fahrenheit would be approximately right. Unfortunately, my thinking isn't in terms of specific gravity; I have always used the table to convert. I believe that a specific gravity of .8 at 60 degrees would be an average for safe solvents. Actually, a specific gravity of .7839 wouldn't give the indication of its safety, nor would the specific gravity of .8.

Pounds per gallon at 60 degrees has no relation whatsoever to safety. I don't know that the initial boiling points of all roofing primers on the market are around 300. They may not be. The average initial boiling point of distillates from roofing primers would be 230 or 240, somewhere in there. As to where the first 10 per cent of the distillate of the solvent of the average roofing primer would come over, I want to cooperate with you, but you have gotten beyond my mental capacity to retain everything. I can't quote those figures with any degree of accuracy and I think I would only [135] confuse the record. For purposes of contrast, I took specifi-

(Testimony of J. M. Kniseley.)

cations from a reference in preparing Exhibit 27. From my general knowledge, I know these materials distill at low temperatures.

Comparing the results of my tests with specifications shown on Exhibit 25, I found the specific gravity to be .95. That is approximately what appears in the specifications as A.P.I. gravity as they are the same things expressed on different scales.

Pounds per gallon at 60 degrees is just expressing specific gravity with another set of figures, and the specifications compare very closely with what I found in my tests.

On viscosity at 212 degrees Fahrenheit, there was a very substantial discrepancy from the figures shown on Exhibit 25. It took four and a half or five times as long for the material to flow through a standard piece of equipment. I have marked my initials on Exhibit 25 at this item, it being the first substantial discrepancy.

As to flash point, the minimum fixed in Exhibit 25 is 80 degrees, there being no maximum, and my finding was 91.

Coming to distillation, I don't know what material is referred to in A.S.T.M. specification D-402-36 as set forth in Exhibit 25, but I think it is one of the cutback asphalts. It is not the standard I used. I have placed a mark around that item. [136]

The distillation per cent by volume at 437 degrees of a minimum of 23 per cent and maximum of 30 per cent compares fairly closely with my tests.

(Testimony of J. M. Kniseley.)

I did not test the per cent distilled at 500 degrees, but picked it up again at 680, and got about the same percentage as indicated in the specifications.

The only test I made on residue from distillation was the penetration test, and I got 36, between the maximum and minimum, which is a fair contrast.

On the next page of the specifications, Exhibit 25, I made the test on softening point and got about the same as indicated in the specifications. I made no tests on penetration, ductility or oliensis spot test.

Relative to the tests on the solvent portion, I did not determine either the A.P.I gravity or the specific gravity, nor did I test pounds per gallon. Initial boiling point I found to be as reflected on Exhibit 27, together with percentages and temperatures.

To summarize, I found it took about four or five times as long for the material to flow through a standard orifice as specified in Exhibit 25; that the solvent had an initial boiling point of 122 degrees, as contrasted to 190; and an end point of 320, as contrasted with 450.

(Noon recess.) [137]

2 o'clock p.m., Thursday, April 29, 1954.

J. M. KNISELEY

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination (T489)

Pursuant to request, I obtained the amount of permissible deviation between tests of flash point from the manual of A.S.T.M, and it is 5 degrees for the open cut flash tester; between two testers, it is 10 degrees. The variation of 2 degrees for one operator and 4 degrees between two operators contained in the volume I showed you is for the closed cup method.

I believe the A.S.T.M would be the accepted standard and I have that volume available. It refers to the Cleveland open cup method at temperatures of 175 or over. I don't have anything that refers to temperatures of less than 100 degrees in the open cup.

Again referring to the result of my tests as contrasted with the specifications contained in Exhibit 25, I have marked on Exhibit 25 with a circle and my initials those items where tests were made by me and a decided variance was found.

I stated on direct examination I found fault with the attempt to heat the primer by the workmen but not with [138] the procedure followed. In a general way, I am familiar with the various methods of heating roofing preparations; that they are divided into the cold category, which may be ap-

(Testimony of J. M. Kniseley.)

plied without heating, and the hot category, which means it has to be heated before application; that the cold types have lower flash points than the hot types of roofing; that the hot types usually are solid, such as tars, with high flash points; that these flash points usually run from 350 to 400 degrees; and that the amount of distillate which can be taken off the hot type is small compared to the cold type.

It is true that two items which I feel make the primer in question most dangerous, namely, low flash point and high percentage of distillate, are lacking in the hot type asphalt. I don't think it is exactly correct that in heating the hot application, the universal practice is to place the material itself in a container which excludes any possibility of the flames or any part of the flames coming in contact with it; nor do I agree that the heating appliances themselves are electric, steam or kerosene, and, if it be kerosene, that they are completely enclosed so they cannot come in contact with the material in the receptacle. There is an awful lot of careless operation of tar pots. I think it is true they have a lid as a smothering arrangement to cut off any fire that may come into the material. [139]

To say whether or not it was a very great exposure to hazard to place two containers comparable to Exhibit 22 on top of a barrel stove, where there was no protection of any kind between them and the flames or coals underneath, particularly since these buckets had holes drilled through the sides

(Testimony of J. M. Kniseley.)

with wire inserted in place of bails, the containers being partially filled with any petroleum product, would embarrass me a great deal, because I don't want to have anybody ever get hurt according to anything I say.

But, actually, you would have an awful time setting a pot of cold roofing afire in that bucket over a stove if there was any distance at all from the flames. Even with temperatures generated of around 600 or 700 degrees Fahrenheit, I don't think you would get it afire.

I am not certain that it is prohibited by safety regulations, municipal ordinances, and so on, to heat any kind of roofing material inside a building.

If the workmen had employed the same heating apparatus with a hot roofing material, I don't think they would ever have got heat enough to apply it on a roof. 400 degrees would be sufficient to cause the hot application to become liquid, but in the ordinary tar pot those temperatures are around 1,500 to 2,000 degrees. That is the temperature inside the fire tube where the flame is under a draft. [140]

Redirect Examination

(T500)

As nearly as I know, all temperatures that have been referred to this morning have been Fahrenheit.

(Testimony of J. M. Kniseley.)

(It was stipulated by counsel that all temperatures previously referred to were in the Fahrenheit scale.) (T500)

The Fahrenheit scale is the one on which newspapers give readings of outside temperatures, and so on.

From my observation of the barrel from which my sample was taken, I would say that the barrel had never been hot, because the label was intact, the outside of the drum showed no evidence of heat, and there was no puffing of the head. I would say that the maximum temperature the barrel had ever been exposed to was 130 degrees.

No exposure to normal temperatures would change the waterproofing qualities of this primer. Petroleum products will crack with excessive heat. As far as primer is concerned, its purpose is to form an adhesion between it and the upper coat, and it isn't required to have waterproofing properties and doesn't have to any extensive degree.

(Objection to the question: "And directing your attention to those specifications, Exhibit 25, assuming a manufacturer prepared the roofing material in accordance with those specifications, would that material be a dangerous material?" on the ground that was not plaintiff's theory [141] of case; overruled.) (T502-503)

The manufacturer could adhere to this specification and it would still have been dangerous, still be subject to causing explosions at normal atmospheric temperatures.

(Testimony of J. M. Kniseley.)

The reason prudent manufacturers follow the custom of placing a red warning label on drums put up for sale where the flash points are at or below 100 degrees is that is the temperature normally experienced in this climate and the intent is to have the materials always above the temperature at which it is being handled.

I have been in attendance throughout the trial and have heard the testimony of Tom Woods, Ira Hoskinson and other witnesses as to what happened. It is my opinion that:

“They had this material in this single bucket that was on the fire at that time and it was warmed up to a point where he soon would be ready to take it up on the roof, which, judging from the things they have said about it, should have been somewhere around a temperature of 110 degrees Fahrenheit, at which point it would be giving off considerable quantities of this gasoline vapor, and these gasoline vapors are heavy, they boil out, and if you hold them up to the light, you can see them, and they boil out and if there is any currents of air coming from the heat, they go up. That condition had probably been going on a good share of the morning, but for some reason, at that one time, those billows of vapor came in contact with some source [142] of ignition. Nobody knows whether it was a static spark or somebody threw a match down that hole, or nobody knows what caused that. Normally, they would go up with the heat underneath them. So they ignited and they flashed.

(Testimony of J. M. Kniseley.)

“You realize that there wasn’t such a tremendous quantity of them. They are very potent, but there wasn’t too much of them, so they flashed and this initial flash that this gentleman driving down the road saw was the combustion of those vapors. The air disturbance and the temperature created by that then stirred up all the dust and all the particles in that building until they then went into the air and became into an explosive condition themselves, and that fire then flashed across the ceiling and these men described it as billowing in the ceiling. Then the next description that I recall is that they looked in there and some of them could see flames and some of them couldn’t, mostly smoke. The air at that time was then deficient in oxygen, there wasn’t enough oxygen to burn, but the heat was there. Everything in there was well above its kindling point. So after that, all that was necessary was for air to come through and the building was gone.”

In my opinion, I am certain it was the ignition of the vapors and not of the surface of the fluid itself.

It is my opinion that the manufacturer should have placed a warning label on the drum containing this primer. [143]

Recross Examination

(T507)

I have had quite a lot of experience and have been employed numerous times to determine the

(Testimony of J. M. Kniseley.)

cause of fires. About 10 or 15 years ago, I was called down to Auburn when the big government warehouse burned. They were using asphalt as an adhesive to put the cork on the wall. Since that time, I have had maybe 15, maybe 25, similar employments.

(A discussion was had before the bench between Court and counsel, out of the hearing of the jury, in which defendant advised Court he proposed to go into the background of employment of witness to show he was habitually employed by fire insurance companies to attempt to attribute losses to someone other than the owner of property.

Plaintiff objected, stating this would open the whole matter of insurance; that plaintiff would be entitled to show he was under-insured; that witness was employed by plaintiff and not by an insurance company in this instance.

The Court ruled that defendant might inquire as to witness' employment in the instant case to show bias, and that other objections would be passed upon as they arose.) (T508-510)

I stated that in the last 15 years, I had been employed to investigate the cause or origin of some 15 or [144] 25 fires; that I didn't recall exactly what the number was. On a share of them, I have been employed to make those investigations for the purpose of determining general safety standards.

(Objection to the question: "Basically, what you have attempted to do in each one of these instances of employment is to attempt to fasten the liability

(Testimony of J. M. Kniseley.)

on somebody that there might be a recovery by some corporation or individual for the fire loss, isn't that correct?" on the grounds of irrelevancy, immateriality and incompetency; overruled.) (T511)

That isn't exactly correct, because the way I got started at this business was that I was employed by I. F. Laucks, Incorporated, an associate of Laucks Laboratories, and they asked me to make a complete investigation to find out whether they were justified in going into the solvent extraction business. For some two or there years that was the major part of my activities. That must have been about 16 years ago.

I. F. Laucks, Incorporated employed me in the majority of the investigations I have made. They put out a variety of products and I was doing the research work as far as inflammability was concerned for them. Excluding I. F. Laucks, I have been employed by attorneys. I have received checks for my employment both from attorneys and from [145] some type of organization behind the attorneys.

(Objection to the question: "And what is the type of organization that employs you to do this work?" as being improper; jury excused, and a discussion followed between Court and counsel. (T514)

Plaintiff stated question was improper cross examination, an attempt to inject highly improper and prejudicial matter before the jury.

The Court stated that counsel was too astute not to know where the inquiry was leading; that a

(Testimony of J. M. Kniseley.)

Federal judge has the right to comment on the evidence, and that if unfair advantage was taken, the Court would do its best to keep the balance even and point out to the jury what is being done; that the Court did not consider it fair to bring out what was attempted to be elicited; that if plaintiff brought out comparable matter, it would be a mistrial.

Defendant stated if Court felt the matter improper, it would not be pursued further; that defendant believed witness has been habitually employed by fire insurance company in the Pacific Northwest for the purpose of making investigations of fires to determine if there wasn't some possibility of recovery; that a man so employed must, of necessity, have a certain amount of bias, and this would be a proper matter to show in the record.

Plaintiff advised the Court he felt what witness [146] might have done in past employments had nothing to do with his present bias; that inquiry as to terms of employment in instant case would probably be proper; that the damage, in large measure, was already done.

The Court ruled defendant might inquire into circumstances and terms of employment in this case; that defendant could show how much he had been employed and on what type of case to test qualifications.

Defendant advised that wasn't his objective and that he would let the matter stand.) (514-520)

To the best of my knowledge and belief, I believe

(Testimony of J. M. Kniseley.)

the specifications called for in Exhibit 25 would fit into the category of a standard roofing primer.

LEONARD L. BURGUNDER

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

(T521)

I reside at West 806 - 16th, Spokane, where I have lived 11 years. My occupation is Deputy State Fire Marshal, employed by the State of Washington, and have been so employed 11 years. Prior to that, I had a general insurance business in Colfax, Washington, where I was City Fire Chief for 13 years.

In my experience, I have done quite a little investigating of fires, particularly those of explosive [147] origin, to determine their cause. I have also attended fire colleges since 1929, where fire control and fire prevention are the major subjects, and they also go into how these fires get started. I feel that I have knowledge beyond that of the average layman as to the causes and origins of fires and fires of explosive origin.

(Motion to strike answer relating to witness' opinion of his qualifications as not qualifying him; motion granted.) (T523)

(Objection to the question: "Mr. Burgunder, in this case there has been testimony that certain material was being heated over a stove of coals in

(Testimony of Leonard L. Burgunder.)

which some apple wood had been permitted to burn down and it was in pails about three-fourths full, and that chemists have testified that this material had a flash point between, I believe, 81 degrees and 91 degrees Fahrenheit, and the testimony is that this heating had been carried on with buckets of this material from about ten o'clock in the morning until somewhere around a quarter to one in the afternoon; that it was in a room 50 by 160 feet in dimensions, with a concrete floor, the barrel being located near the center of the room, that is, the buckets that were being heated, and that several of the doors were opened and there was a rather brisk wind blowing outside, and the man that was there had his back turned to the stove on which this material was being heated and [148] had walked away possibly 15 or 20 feet when he heard a violent noise, I think he described it as a 'whoosh,' something like that, and at the same time a man driving towards the building, who had a view directly through the open doors to this room, said that one instant there was nothing and then he saw a brilliant, very brilliant flash of reddish, orange color and within a minute thereafter this entire large room of 50 by 160 feet with an 18-foot ceiling was entirely enveloped in flames; what, in your opinion, occurred there?" on the grounds it relates facts assumed to have existed and in part relates or refers only to testimony of certain witnesses; secondly, as a hypothetical question, it does not include in the hypothesis all the facts which

(Testimony of Leonard L. Burgunder.)

existed and in part misstates facts which are established by the evidence; that it is not properly framed.

There was added to the question: "Well, there were at least two doors open then to the outside from this room, and, furthermore, the outside temperature was in the vicinity of 90 degrees and, furthermore, assuming that after this man that was in the room heard this violent noise, he turned around and immediately saw approximately half of the ceiling of that entire room a mass of flames billowing down, and also when he first turned around there was no flame around the stove or the pails which were on the store, all of the flame he saw when he turned around was billowing down [149] from the ceiling; now can you express an opinion as to what happened?" Objection renewed as improperly framed and incomplete; overruled.) (T523-527)

From the description, I would say you had a flash fire caused by the suspension of flammable vapors in the atmosphere. There was evidently some residues on the ceiling that made the fire continue to burn, such as dust or the wood not painted or splinters out of the wood, to sustain the fire. It was not the substance that burned itself, it was the vapors that come off that burned. These vapors get in suspension in the air and evidently were ignited from some source or other and caused what we call a flash fire. Ordinarily, a flash fire is very terrific, considerable noise, considerable air cur-

(Testimony of Leonard L. Burgunder.)

rents, and if there is sediment on the ceiling and walls, dust of any type or splinters, that begins to circulate in the air also and makes the fire that much hotter and keeps it going.

In my position, I am familiar with national and state regulations having to do with the labeling of petroleum products put up for sale to the public of certain flash point or all flammable liquids.

(Objection on ground standard not named; overruled.) (T529)

The standards I have referred to come from, first, the National Fire Protection Association; the other one is [150] the National Board of Fire Underwriters. If my memory is correct, that standard calls for labeling of containers put out for sale to the general public with flash points below 150 degrees.

Cross Examination

(T531)

As I understand it, the National Board of Fire Underwriters is a group of fire insurance companies, a non-profit organization, which through experience and testing and their cooperation with the Underwriters Laboratory in Chicago, has set up certain standards. They work in conjunction with the International Association of Fire Chiefs and Firemens Association. I am not a member of the National Board of Fire Underwriters. They put out pamphlets from time to time, as does the International Association of Fire Chiefs, of which I have been a member for a number of years, on

(Testimony of Leonard L. Burgunder.)

various hazards that are developed through new developments in industry and sciences. The National Fire Protection Association is a group of manufacturers and business men working in conjunction with the fire service. I am not a member of this organization.

I believe I have publications setting forth the standard I have mentioned in my office. I would imagine the classification calling for a warning label below 150 degree flash point would include material to be applied to the exterior of a roof. It depends on what the roofing material [151] is made out of. I think you will find roofing material put out in rolls that carries the Underwriters' label. I think you will find there are other roofing materials that do not carry the label, but still the insurance companies give a credit for it because it will not set fire with a spark.

(Motion to strike portion of answer dealing with different types of roofing materials granted.)
(T533-534)

We would classify as flammable either solid or partially liquid asphalt for application to the exterior of the roof of a building. I am not sure what the flash point of any particular roofing material is. My knowledge of the fire hazard in connection with asphalt roofing materials comes from practical experience and what I studied. The 150 degree flash point regulation does not say what kind of material it refers to. I think I have the regulation in my office. The reason I didn't bring it with me

(Testimony of Leonard L. Burgunder.)

is that I didn't know what question would be propounded to me.

I don't think the recommendation of the National Board of Fire Underwriters says anything about asphalt or any other product; it simply says any flammable liquids, that they should have a warning label on them. It would depend on the consistency whether asphalt roofing material for application to the exterior of a roof would be classified as a liquid. Some roofing is different from others, I think, and [152] I think some is thinned down in various ways. I don't know what degree of viscosity it has to have to be classified as a liquid.

I would say that the specifications read to me from Exhibit 25 might apply to a chemist that has knowledge of that. That is why we of the fire service depend upon the National Board of Fire Underwriters and the National Fire Protection Association to tell us what materials, not always specific gravity and all this other stuff. We are firemen, we are not chemists. If the flash point of this material is under 150, I would say it would ask for a label on it. The rules that I have read from the two organizations do not specify whether it was cold or hot roofing material. Anything that has a flash point under a certain degree is what they recommend.

I would hardly think this rule was merely a recommendation among fire insurance companies. It is put out so that the ordinary layman will also

(Testimony of Leonard L. Burgunder.)

know what precautions to take when he uses certain products.

These reports are sent to me in my capacity as Deputy Fire Marshal and also as a member of the International Association of Fire Chiefs and International Association of Arson Investigators. I have bulletins from International Association of Fire Chiefs in my office, but I did not bring them with me. I don't recall whether these bulletins contain [153] any reference to a cold roofing material for application to the exterior of roofs. I think I have bulletins from the National Board of Fire Underwriters referring to flammable liquids and materials, but not to asphalt roofing.

(Whereupon, plaintiff recalled and called witnesses on the subject of damages (T545-968), during which testimony certain references were made to liability aspects of the case, as follows:)

RHEA ROSENBAUM

testifying on behalf of the plaintiff.

Cross Examination

(T921-927)

I have heard testimony as to the loading dock on the south side of the warehouse; that there was a concrete section outside of each doorway and the same size as the door. The rest was a wooden platform which extended between all the docks the entire length of the building. I believe the concrete platform outside each door was 6 feet wide. The

(Testimony of Rhea Rosenbaum.)

wooden platforms were all burned out in the fire.

I didn't make any particular check after the fire as to the barrels of roofing which had been out on the loading dock to see what became of them. Insurance agents were there and various other people and I didn't particularly. Part of the barrels were standing on the wooden dock which burned and they fell to the ground. I believe that is also [154] true of the primer.

I believe my attention was first called to this one barrel of primer which was saved by Mr. Cashatt and Mr. Williams several days after the fire. I had not talked with Mr. Segerstrom about it and had not met Mr. Cashatt or Mr. Williams prior to that time. I had been told they were representing Mr. Segerstrom. At their direction, I hauled the one barrel away. There were two other barrels with the bungs out that had a little bit left in them. We also took those down to the place and I believe they are still there.

As to this one barrel of primer which was saved, I don't remember the plug being out. It has always been in according to my recollection, but I probably am not positive about it. I just don't remember it being out.

Three of the six barrels of roof coating were also on the platform and in the fire. The barrels had not burst but they were all turned over and their contents had run out. The other three barrels of roof coating were on this little concrete dock,

(Testimony of Rhea Rosenbaum.)

I believe. I don't believe we saved any of it and I don't know what became of the barrels.

It was within a few days, four or five days or a week after the fire that Mr. Cashatt and Mr. Williams came out. I couldn't say how many people examined this material or these barrels because I was only there at times, but there were other people there. It was five days to a week later [155] that I took the barrel down to my house and placed it under a machine shed where we keep the machinery, which is located about 300 or 400 feet from the house. I don't recall very many people examining the barrel at my place except Mr. Williams and someone taking samples. I gave it no particular attention or care as I hadn't been given any instructions, only to put it under the shed.

Redirect Examination

(T929)

The drum of primer from which the samples were taken was sitting on the concrete loading dock. It did not fall off down on the ground, but was still sitting on the concrete dock.

Plaintiff Rests

(T968)

(Defendant moved for dismissal as follows: "At this time, the plaintiff having rested, the defendant moves that a judgment of dismissal be entered, for the reason that under the law and facts the plaintiff is not entitled to recover.

“I particularly call the attention of the Court to the fact that this plaintiff had an instruction book, which he did not give his employees, which told him and them in plain letters to not heat or thin Battleship, to which he [156] paid no attention.

“Secondly, his men were using it in a manner which was never intended, quite apparently, by the manufacturer; namely, they were heating it over an open fire; and, third, that there has been no sufficient competent evidence of damages sustained by the plaintiff to put the defendant on its proof, because they have simply put in the estimated cost of erecting a new building. They made no effort to erect this new building, didn’t even secure bids on it, and I am making that motion.

“I know the hour is getting late and I am getting tired myself and I know your Honor is. I think it is well taken, frankly.”

The Court ruled:

“I think there is a question of fact for the jury here. I will deny the motion. I might say that I will consider it both as a motion for dismissal and for directed verdict. I think it would be sufficient to make either, but it will be so considered and it will be denied.”) (T970-971)

Defendant made an opening statement to the jury. (T971-977) [157]

BOB SORBY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T977)

My name is Bob Sorby; I live in Spokane; I am self-employed, I do different kinds of work, cement work, gardening, landscaping, a little of everything. I work for St. Joseph's Parish Catholic Church and have off and on for 10 years. I do quite a bit of painting for them and act as sort of a handyman in my spare time.

I put some Battleship roofing primer on the convent over there. The material was received in either June or July of last year and was ordered by the Pastor. I didn't put it on until October when there was a rain and the roof leaked. I had planned a hunting trip to the Coast and was not working at the time. The primer had been kept outside during the summer, but had been in the basement for a month prior to using it. We had a 55-gallon drum and a 20-gallon drum of primer and also some of the roof coating.

(Objection to question as to whether there was difficulty encountered in drawing material from material on ground of no showing primer came from same batch as plaintiff's primer; overruled.) (T980-81)

We had no trouble drawing it out of the barrel. It did flow rather slow, but it did flow freely out of the barrel. [158] We wanted to put the material

(Testimony of Bob Sorby.)

on thicker than usual because they don't generally re-roof those buildings only every 10 or 12 years, so we used a large rubber squeegee. We were going to use a brush and tried it, but it was a little slower and we were in a hurry to go hunting.

We covered three roofs, one of which was 40 by 60, I believe, another one was probably 50 by 60, and the large building was 100 by 40, or something. It rained one day while we were doing this and we suspended operations then.

Cross Examination

(T983)

We used the stuff the wrong time of the year. October is not the right time of year to do roofing and it was cold, because the barrel set outside during the day and overnight when we were using it. In the mornings real early it was a little thicker than usual, and towards evening you might have a little trouble brushing it out. But we used a brush on the asphalt coating and that is heavier, and we had no difficulty. We used the squeegee because we wanted it a little thicker.

FRANK L. LYMAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T984)

My name is Frank Lyman; I live in Spokane; I

(Testimony of Frank L. Lyman.)

am the engineer for the Carnation Company. [159]

My duties include looking after the maintenance of a building about 100 by 150.

In February or March of 1953, I purchased some Battleship primer and Battleship roof coating, and used it about June.

(Objection to question as to whether witness read instruction book as wholly immaterial; overruled)
(T985-986)

I read the instruction book. In the case of the primer, I don't remember whether there was any particular odor to it as we used several kinds of roofing.

Before we applied the material, we had it down in our shop down in the basement. We just used it for patching on an area about 20 by 20 foot. We used one of these cleanup brushes we have with a stick or handle on it to apply the primer. We had no difficulty in brushing or spreading it or in pouring it from the barrel.

Cross Examination

(T987)

I got a 15-gallon drum of primer and 15 gallons of the finish coat. I bought it from a salesman, but I don't remember his name. We might have a little of the primer left, but I think we used most of it. I didn't put any of the material on myself, but I was up on the roof most of the time it was being done. It didn't take too long to put it on. That doesn't go on very hard, just like mopping it on.

(Testimony of Frank L. Lyman.)

[160] I was up there until they got the first coat on all the time.

We kept the material in our shop in the basement before applying it. It is really the ground floor, but we call it the basement. The boiler room is on the same floor as the shop, but it is outside the building, 75 or 80 feet from the shop. The boiler runs all summer, but I doubt whether you get much heat from the boiler in the shop. It is warm enough in the basement in the summertime, anyway, as far as that goes. There is a compressor room between the boiler room and a kind of an alley, about a 20-foot alley.

We took the material up on the roof before we started and it sat in the sun awhile. We might have taken it up the day before and applied it the next morning. It was a hot day when we put it on. I don't know whether we started in the morning or afternoon.

Redirect Examination

(T993)

This material was kept 75 or 80 feet from the boiler room.

BOB SORBY

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination

(T994)

When I opened this drum, I detected a definite [161] odor. At first when I noticed the odor, I

(Testimony of Bob Sorby.)

thought it was tar, but it was like a tar odor or something like a petroleum odor.

Cross Examination

(T994)

We put the primer on two roofs, one was about 40 by 60 and the other 45 by 60. They would be considered flat roofs. They sloped to the middle for an inside drain. We used 75 gallons of primer and there might have been another 10-gallon drum, I can't remember exactly. I think it was possibly 90 gallons in all.

RALPH E. SEXSMITH

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T996)

My name is Ralph E. Sexsmith; I live in Spokane and have for 50 years; and I am employed by Washington Machinery & Supply Company as a purchasing agent, timekeeper and building maintenance man.

About March of last year I bought some Battleship products and they were delivered about the first of June. I helped apply it about two weeks later. We used a roof brush, bristle brush, to apply the primer. When the primer was opened, I noticed a petroleum odor.

I left the material out on the back loading dock

(Testimony of Ralph E. Sexsmith.)

in [162] the sun. If it was a cool day, it wouldn't run, but leave it out there in the sun and as soon as the sun warmed it up, it was okay, run fine. We didn't have any trouble spreading it on the roof. We used about five drums of Battleship and about one drum of primer. I read the instruction book which I received before we applied the material.

Cross Examination

(T998)

We just covered about 60 squares with the primer that we thought needed it. The material was on the loading dock where it was unloaded for about two weeks, which is on the south side of the building with no roof, so it was exposed to the rays of the sun. We applied it from about the middle of June up through about the middle of July, depending on the weather. There was days it was pretty chilly and you can't work a roof when it is cold. If the sun was right, and so on, we was working. On a cool day, the material would run very slow from the barrel, which is the reason we didn't use it on a cool day. We waited until it was a hot day and until the material had been out in the sun for some time and then it came out all right.

ED NOBLE

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1001)

My name is Ed Noble; I am staying at the Community [163] Hospital out east of Spokane where I am working doing the chores and janitor work around there. I am 70 years old.

In June of last year, I received two barrels of Battleship primer and three barrels of roof coating and applied the primer around the last of June or the first of July. We put it on the hospital and gym. The hospital formerly was Spokane University. We waited about a month and then applied the top coat in August.

I didn't pay much attention to the odor. It had a little bit but not much that I could notice. I did not have an instruction book that came with it. I used brushes to put it on and had no trouble spreading it or drawing it from the barrel.

Cross Examination

(T1004)

The roof on the hospital is flat and the gym has a sloping roof. I used a block and tackle to pull the material up the outside of the building on the hospital. On the sloping roof I had a jack up there and pulled it up with a block. It was real warm weather when I was putting this primer on. It didn't run too slow from the barrel.

I have been a roofer for Montgomery & Ward for

(Testimony of Ed Noble.)

three or four years and I guess I have used close to 150 barrels of Battleship and Ward's together. I have used both kinds when it was pretty cold. If it was warm weather, we always set it out where it would be the warmest place. [164]

I had no trouble at Community Hospital in spreading it. The material had set outdoors and it was plenty warm enough. I started putting it on early in the morning. I put Battleship on the hotel at Chewelah in the fall and spring when it was cold and I had some trouble there. On several occasions we used fuel oil to mix in with it, cut it like turpentine would paint. We used kerosene to thin the primer when we couldn't get distillate.

Redirect Examination

(T1008)

Some roofers, I know, thin asphalt roofing with fuel oil when it is too stiff to spread. I never worked with any other bunch. We found out that would thin it and that is what we used. We know it is made of oil so we put another oil in it. It smells like oil.

HERBERT C. MANTHEY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1009)

My name is Herbert C. Manthey; I live in Spo-

(Testimony of Herbert C. Manthey.)

kane and have since 1914; I am maintenance man for Inland Motor Freight, where I have been employed 10 years.

Under my supervision are all the buildings of the company on the west side of Idaho, all of Washington, and part of Oregon. There are a considerable number, but I couldn't say just how many there are. They are the buildings [165] used for freight houses at the different depots.

I can't recall just when we got the Battleship primer and roof coating, but I was told we had quite an amount of Panther roofing at Walla Walla which we were to use on our buildings. I used a little over 15 gallons of a 55-gallon barrel on the Pullman building in June of 1953, and the remainder of it on the Lewiston, Idaho building in the latter part of September, finishing on the 2nd day of October. I don't know just when the material was purchased.

I did the work myself to get acquainted with the job and had no trouble whatsoever in spreading the material or drawing it out of the barrel. There is more of an odor to it than the ordinary asphalt. It has a petroleum smell.

Cross Examination

(T1012)

I used a 55-gallon drum and a 15-gallon drum of the primer. This was my first experience with Battleship. I know nothing about the purchase, but I presume it was made by the purchasing agent.

(Testimony of Herbert C. Manthey.)

I put the 15 gallons on at Pullman myself in June. I didn't leave the barrel out in the sun before I started using it. If I remember offhand, the building there is 50 by 60. The building at Lewiston is built like a "T". I think it is 136 or 38 feet long and one side of the building has an offset of 30 by 60, I believe, and then the office is 30 by 36, and I used the primer on the office part and over the [166] other offset.

Redirect Examination

(T1014)

I received an instruction book and read it before I applied the material.

JOHN SNYDER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1015)

From 1914 to July, 1952, I was in the roofing contracting business in Spokane, operating under the name of Snyder Brothers. I sold out in 1952.

I am familiar with hot and cold roofing applications. Hot application is what the roofers term hard asphalt. We were not very much concerned with the flash point, but on the few occasions when we had a chemical analysis made of it, it would run from 450 to 500.

Hard asphalt has to be heated to a temperature of anyway from 300 to 450. It is used in the con-

(Testimony of John Snyder.)

struction of new roofs and the asphalt is so heavy it has to be heated to the point where it will properly spread to apply it. To heat it we used an oil burning kettle with tubes submerged in it which are heated with a high pressure torch, and there is a little pot or little well-like place that the torch sits down in. [167]

Defendant's Exhibit 46 for identification shows three different types of kettles, but they are all the same as far as the heating part of them is concerned.

Defendant's Exhibit 46 admitted. (T1018)

(The witness was temporarily withdrawn.)

A. GUNNAR ERICKSON

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1019)

My name is A. Gunnar Erickson; I am engaged now in operating my own business under the name of the Spokane Testing Laboratories, and I have been so engaged in Spokane for approximately a year and a half. Prior to coming here, I worked for the Navy Department on the Coast for approximately eight or nine years as a chemist, and prior to that I worked in the mining and metallurgical fields in laboratory work. I have had approximately two years of college courses, but I do not hold a degree. The testing that I have done is

(Testimony of A. Gunnar Erickson.)

a matter of practical experience and from practical testing.

Pursuant to request, I conducted certain tests to determine the heat generated by an apple wood fire, and I have with me the records of those tests. I made a barrel stove out of a 55-gallon drum, an ordinary 55-gallon exchange drum, and I had it cut so that it had an opening at the top [168] copper alloy; in other words, it is a form of thermometer very commonly used in industry and laboratory work.

I used water in the containers in my test, and I believe I would get a lesser temperature than if a heavy viscous material had been used, because of the water attaining a maximum temperature of 212 degrees.

You see the thermocouples extending out here on Exhibit 47 and they extended inside halfway distance of the bucket and were approximately an inch below the bucket, and here are the leads leading to my indicating pyrometer. A pyrometer measures the current that is generated. It is an electrical way of measuring temperature. I recorded the temperature generated under each of the two buckets.

After starting the fire with the kindling, I put in the apple wood and took an initial reading 10 minutes after it was burning, and from there on I took readings at 5 minutes, switching from one thermocouple to the other and getting the temperature underneath both buckets.

(Testimony of A. Gunnar Erickson.)

Defendant's Exhibit 49 for identification is a graph showing the temperatures in relation to the time during Test A, the first test I ran. The graph in blue reflects the temperature readings taken of the bucket to the front of the stove and the one in red those taken underneath the rear bucket. The column on the left-hand side of the exhibit indicates degrees in temperature on the Fahrenheit scale; the [169] approximately two feet by one foot when in a horizontal position. Then at the back near the top I cut a three and a half inch hole and then at the front there was approximately a 12 inch circular opening for charging the stove. This was done in the early part of February of this year.

When I started my test, I obtained some kindling wood to start the initial burning, and then I had some dry, unpeeled apple wood. When I first started, I used four pieces of one inch by two inch diameter and three pieces four inch to six inch diameter, approximately 30 pounds of apple wood.

Defendant's Exhibits 47 and 48 for identification are photographs of the stove that I referred to.

Defendant's Exhibits 47 and 48 admitted.
(T1023)

Exhibit 22 is substantially the same type of container that I placed on top of the barrel stove referred to in Exhibits 47 and 48, and there was room for two of these on the stove.

Before I started my fire, I had two thermocouples

(Testimony of A. Gunnar Erickson.)

in place underneath the two buckets approximately one inch below the bottom of each, and these were connected to an indicating pyrometer so that I could switch to either thermocouple and take readings of the temperature any time. A thermocouple is a tube of two dissimilar metals. In this case I used iron to constantan, which is iron and a nickel-column [170] at the bottom indicates time in minutes.

Defendant's Exhibit 50 is an identical graph, set up in the same way, except it shows the readings taken during Test B, which followed Test A.

Test A, I started the fire with apple wood and it continued for 135 minutes. At the end of that period, I had low coals, and then I put my second charge of apple wood in and started Test B. In the second charge, I used five pieces of one inch to two inch diameter and two pieces four inch to six inch diameter, approximately 32 pounds of apple wood.

Voir Dire Examination

(T1028)

I started the fire and began taking temperatures after 10 minutes, initially. The fire was burning briskly at the beginning. As time went on, it tended to start burning down to coals. I would say it took approximately 100 minutes to 105 before it was entirely coals and there was no flame. In Test B, I had a very low fire or coals at 135 minutes. In that

(Testimony of A. Gunnar Erickson.)

test there were some larger pieces which kept flaring up a little bit.

The lower curve plotted in pencil on Test B are readings I took from a thermometer hung between the two buckets approximately halfway down from the top of the buckets.

Defendant's Exhibits 49 and 50 admitted.
(T1031) [171]

Direct Examination—(Continued) (T1031)

The thermometer between the buckets is shown in Exhibit 49. That took the temperature of the air a few inches below the top of the two buckets, as contrasted with the temperature taken at the bottom of the buckets by the two thermocouples.

I believe 55 is the beginning of the test on the vertical graph of Test A. The peak temperature under the rear bucket of 950 degrees was reached in 20 minutes. There were fluctuations in the fire which account for the rises in temperature.

At the end of Test A, I stoked up the fire and placed the second charge of apple wood right on top of the coals, and that is what is indicated in Test B, Exhibit 50, as the beginning of the test. The two tests show the inception of the fire; at the end of 135 minutes the building of the fire again and the new charge and the final running down of that.

As I said before, it took about 105 minutes in the first test to get down to a bed of coals. There might have been a few small flames at that time, not high

(Testimony of A. Gunnar Erickson.)

flames. I wouldn't say there were constant flames for 105 minutes, because the pieces of apple wood were pretty good sized diameter and they wouldn't burn briskly, they burn around the wood. At times, it would flare up a little bit and spark. [172] After 135 minutes in Test B, I had mostly coals, but some burning, because there was one large piece of about 6-inch diameter that kept burning for a considerable time, small flames.

Cross Examination (T1036)

These tests were conducted in my laboratory located on the premises of the Spokane Steel Foundry. I have my laboratory in the foundry building, which is constructed of concrete blocks with a concrete floor.

A wooden sawhorse with composition boards of some kind are shown in Exhibits 47 and 48. On the extreme left side of the picture is shown the wall of the building, which is of frame construction, that particular end of the building. I would say the barrel stove was 15 or 20 feet away from this wall, which I thought was a safe distance. I felt I was far enough removed from anything combustible, that I was far enough away from that frame wall and sawhorse, so there was no danger.

I conducted no controlled tests with other kinds of wood, but I ran a preliminary test with some regular wood to get an idea of what temperature ranges I would get. I can't say definitely how apple wood compares with any other wood.

(Testimony of A. Gunnar Erickson.)

The temperatures shown on the graphs have no relation to the temperature of material inside the buckets, but reflect the temperatures of the thermometer directly [173] exposed to the flames.

I couldn't say offhand how hot the plate is on an ordinary electric stove.

It is true that the amount of heat and the duration of a fire depend upon the size of the sticks and just how hot a fire you get going in the stove.

A little flareup in some of the burning embers probably accounts for the upsurge on both lines of Test A between 100 and 112 minutes. I had some flames at 105, but at 115 I had all coals. There was nothing but coals at 135 minutes, but there were sufficient to start the fire again with them. From about 136 minutes on up to 225 minutes, I still had coals.

Redirect Examination (T1041)

I did not put any petroleum products inside the buckets during the test, I used water. They melt steel in an electric furnace in this building, and I did not feel I was taking any undue risk, as there is hot metal all around that building.

Recross Examination (T1042)

I imagine there are fires of various sorts maintained in many buildings in different industries.
[174]

JOHN SNYDER

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued) (T1043)

It is quite a difficult problem to explain the workings of a tar kettle unless you see one in action.

Exhibit 46 shows the tank or container where the hard asphalt goes. This is the fuel tank and this is a hose that goes from the fuel tank into the burner. This tank is approximately 5 feet in length and 2 feet in width, oval bottom. These two little stacks projecting up maybe a foot above the kettle is the outlet of the fuel after it is exhausted. Right here is a little well that is encased all around with metal and extends down to the bottom of the kettle. That is where the high pressure burner sits, which is fed from fuel from the tank, either coal or oil stove, and that burner feeds at high pressure, more like a torch. It blows into a heavy iron tube that extends from the burner clear to the end of the kettle. Then at this end of the kettle, that heavy 6-inch tube is divided into approximately two 3-inch tubes that turn around in an elbow and come back here. In other words, there are three tubes in there, one large and two small ones. Here are the outside ends of the two smaller tubes where the heat is expelled.

It is not possible for the flame to come in contact with any of the asphalt. We heat the asphalt in this sort of kettle from 300 to 450 degrees Fahrenheit, depending on the type of roof and its condition. If you get the material substantially above 450 de-

(Testimony of John Snyder.)

grees, your flash point is apt to occur. If that happens, the man tending the kettle flips a lever and this cover automatically flops down in place and smothers the fire out in less than a minute. It is a safety device.

I never saw or heard of one of these kettles being heated to 1500 degrees Fahrenheit. These kettles have thermometers to register the temperature.

When the asphalt is heated to the temperatures I have indicated, it is a liquid and it is applied in liquid form. When it is placed in the kettle, it is hard like coal.

I have never known of the use of one of these kettles inside a building where the ventilation is impaired. I don't think the city ordinance permits that. We have never done it and we have never asked the city to do it. I wouldn't consider that a safe practice, because these kettles are usually operated with the cover up and, if it should flash inside a building, you might have a fire before you could get to it to throw the cover down.

If you heat a petroleum product having a flash point of 450 degrees inside a building over an open flame, [176] you might have trouble there, because when that is heated there is a vapor comes from it. That is true of any petroleum product that I have ever used.

I have used cold application roofing. It is made in liquid form so that it is ready to be applied to built-up roofs during suited weather for a maintenance coat. We never heat the cold application. It

(Testimony of John Snyder.)

is not supposed to be heated. We use the cold roofing under certain conditions where it is a great risk to carry hot asphalt any distance. I have used the cold application all the time I was in business.

(Objection to the question: "During that time, Mr. Snyder, have you ever seen any cold application with warning labels on the container in which you received it?" on grounds of incompetency, irrelevancy and immateriality; flash point not specified; overruled.) (T1051-1052)

"No, I have never seen that."

Cross Examination (T1053)

On the cold roofing materials that I have worked with, I don't know anything about their flash points other than I know it is quite low. We are not concerned too much about flash point in our business; it is the melting point we are concerned about.

Many times I have gotten some of the cold application that was too thick to be applied. In that case, the [177] instructions on the can usually say to set it out where it will warm up. In the first place, the roofing business is more or less seasonal; we don't paint and coat roofs in wet, cold weather. This roof paint is made with the purpose in mind of its being used during suited weather when your temperature is reasonably warm, either in the spring or fall.

If it is too thick, you can either set it out in the sun for awhile or add a little thinner like I would a bucket of house paint. I should be an expert in this field; I put in 38 years at it. I know about this stuff

(Testimony of John Snyder.)

and know it has low flash points, and I wouldn't think of setting that on the stove and heating it up. As many men always as we worked, I never heard of one of them that would ever put it on a stove.

Another angle, if the material is real chilly and stiff, say your mercury is up to 70 or 80 or 90 degrees, even if it is so stiff you can hardly dig it out, you can go ahead and dip your mop into the bucket, spread it on the roof, and in 10 seconds after it hits the hot roof, a roof so hot you can't hold your hand on it, why it will warm in just a few seconds sufficient to spread.

I know that even the hot application asphalts give off vapors when they are heated, and I know that these vapors can collect and cause an explosion; that the vapors themselves can explode. The tar pots sometimes catch fire, but [178] they don't explode and blow to pieces.

I have never heard of tar pots being used inside of buildings under any occasion and, as far as I know, I don't know of anybody that has ever done it.

I know the difference between a hot asphalt and a liquid asphalt and I know there is a difference in flash point.

These tar pots do get fairly dirty in use. The type shown in Exhibit 46 is just exactly the type we bought in 1940 and I think we had the first one in town. There are several companies that makes these kettles, but the heating apparatus is just exactly the same on all of them that I have seen, even the real old ones. The common picture that is

(Testimony of John Snyder.)

seen on the street every day where roofs are being applied, they get pretty beat up and dirty and there is lots of smoke coming off. On any type that I have seen, you can't see the flames passing along the street, because the flames sit down in a well that is perhaps two and a half feet deep.

There have been a few occasions in my experience where it was necessary to haul the roofing application up to the roof through a manhole in the building, rather than up outside to the roof, where it was difficult for us to haul it up outside.

I know from my experience that the cold roofing [179] application contains some pretty inflammable stuff. I don't know how inflammable the thinner is that is used to thin out this material, because I am not a chemist and I am not an expert on that.

ENREST E. GETCHELL

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1064)

I have lived in Spokane since 1943; I am a shorthand reporter, general reporting, and was a reporter in the Superior Court in Spokane for 7 years, and have been a shorthand reporter for 31 years.

I acted as the reporter in the taking of the deposition of John Woods on January 7, 1954, and I have my notes with me that I took at that time. Mr. Woods was sworn by me.

(Testimony of Enrest E. Getchell.)

Mr. Woods was asked the question: "By noon-time, I suppose the coals had gotten pretty well down to ash, hadn't they?" and his answer was "Yes——"

(Objection on ground Mr. Woods admitted that was his testimony. The Court stated Mr. Woods either denied stating it or said he didn't remember; overruled.) (T1066)

His answer was: "Yes, Rosenbaum's brother watched the fire and built a good fire while we was gone. We had enough so we had some coals after dinner. That is the way it was." [180]

According to my notes, the next question asked was: "After you went to dinner, Rosenbaum's brother put some more wood on the fire and built it up?" and the answer was "Yes."

(Court adjourned until 10 o'clock a.m., Tuesday, May 4, 1954.)

Tuesday Morning, May 4, 1954, 10 o'clock a.m.

ETHLYN GRIMMER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1068—Vol. V)

I am Ethlyn Grimmer; I have been employed by Riverside Warehouses for 14 years; I am a member of the Grimmer family who have been in the warehouse and transfer business in Spokane for a long time. I take care of the records of the various

(Testimony of Ethlyn Grimmer.)

companies for the Riverside Warehouse, whose business is that of warehousing and cartage. They receive and distribute merchandise that is shipped in for storage by people who have customers in this community. We receive it and keep a record of it and send it out on orders from the owners of the merchandise. We have well over a hundred such customers, but I wouldn't know how many. [181]

We have in storage Battleship products from Panther Oil & Grease Company, and have had this account for approximately 10 years. The merchandise comes to the warehouse in carload lots from the railroad. Several days before a car is expected, we receive a manifest from the Royal Oil Company in Denver. When the carload comes in and is put in storage, a record is made in the warehouse which is turned over to me and I, in turn, make 4 or 5 copies. If there is damage, we make 5; otherwise, we make 4 copies. Two go to the company, one to the Royal, and one for our records and the other to the railroad. The original goes to the Panther Company at Fort Worth, Texas. The shipments come from Denver.

Defendant's Exhibit 55 for identification are the reports which are made up when each car arrives. I make up the record and after that it is in my charge.

Voir Dire Examination (T1073)

Exhibit 55 indicates all the cars received from about October, 1952 through April 15, 1953.

Defendant's Exhibit 55 admitted. (T1074)

(Testimony of Ethlyn Grimmer.)

Direct Examination—(Continued) (T1074)

The first car was received on October 8, 1952. Any shipment of merchandise which is damaged is returned to the railroad, regardless of the customer involved. [182]

Other cars of Battleship products were received on February 24, 1953; March 25, 1953; and April 13, 1953, which are all the cars that were received between October, 1952 and April, 1953. In each case where there was damaged merchandise, it was returned to the railroad.

On deliveries out of the warehouse of this material, Panther Oil Company sends out an invoice in duplicate, and from that I make a list which is on the pink sheet. That is our list which I make up every day and I use it when the auto freight gets mixed up in something. I then take the invoice, put the date that it is to be shipped, the auto freight by which it is to be forwarded, and return it to the warehouse for being filled. Defendant's Exhibit 56 for identification is the record of which I have been speaking.

Voir Dire Examination (T1077)

Exhibit 56 contains the names of all the customers of Panther to whom any of these products were shipped between the first of January, 1953 and the end of April, 1953. Every delivery is listed and there is no way to tell by that exhibit which

(Testimony of Ethlyn Grimmer.)

customers receive the primer. I do have such a record.

Defendant's Exhibit 56 admitted. (T1078)

Direct Examination—(Continued) (T1078)

On Exhibit 56, the first column contains the name [183] of the customer of Panther; the next column the customer's address; the next column the auto freight name; the next column is whether the shipment went out prepaid or collect; and the next column is Panther invoice number which I had received from Fort Worth.

Those are the names of every customer, his address, Panther's invoice number, and the carrier which transported the merchandise, shipped from the Riverside Warehouse of Battleship products from the first of January until the end of April of 1953.

Defendant's Exhibit 51 for identification is one of the 3 copies of the invoice we receive from the Panther Company which we send to the warehouse for filling. This is the copy which we retain for our files, and this is a part of our permanent files. Exhibit 51 contains a copy of every invoice that went out, together with the freight receipt from the carrier.

Voir Dire Examination (T1083)

The first invoice in Exhibit 51 is dated December 29, 1952 and the last one January 27, 1953, which represents all of January's business of any nature

(Testimony of Ethlyn Grimmer.)

with the Panther Oil Company. January is always a very light month.

Defendant's Exhibit 51 admitted. (T1084)

Direct Examination—(Continued) (T1085)

Defendant's Exhibits 52, 53 and 54 for identifications are the same records of the deliveries to the carrier and our copy of the invoice for Battleship products in the months of February, March and April of 1953.

Defendant's Exhibits 52, 53 and 54 admitted.
(T1085)

The pink sheets comprising Exhibit 56 are made up from the invoices sent by Panther contained in Exhibits 51 through 54. These were all made up by me as I do all the Panther work myself. The invoices are filed numerically, but the pink sheets are listed in order of the date of delivery.

Cross Examination (T1087)

This material comes into the warehouse in drums of various sizes and all we do is store them. We simply remove them from the railroad cars, they are closed and sealed, they are stored, and are shipped to the customer on order.

The items of damage reported to the railroad are when drums are bent or stove in or leaking, in which event they are sent back to the railroad immediately.

Redirect Examination (T1089)

Nothing in the way of damaged merchandise is

(Testimony of Ethlyn Grimmer.)

put [185] in the warehouse; the physical property is returned to the railroad.

RALPH UHRMACHER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1090)

My name is Ralph Uhrmacher; I am Research Director for the Panther Oil & Grease Manufacturing Company of Fort Worth, and have been so employed for a few months better than four years.

I received a bachelors degree in chemical engineering from the University of Arkansas in 1929 with first honors. I graduated first in the class in chemistry, first in chemical engineering, senior honors, engineering honors, and half a dozen other assorted ones. Because of that, I was offered and accepted a research assistantship to the Massachusetts Institute of Technology, which made me a member of the staff at M.I.T., and I received a masters degree in 1931 from that institution. Along with my duties as a research assistant at M.I.T., I was also assistant to the head of the department in his own consulting practice. I also worked with Professor P. K. Froelich, who has been the President of the American Chemical Society and is presently Vice President of the American Can Company. I also worked with Professor W. K. Lewis, who was considered to be the father of [186] chemical engineering. In my graduate work there, I had special

(Testimony of Ralph Uhrmacher.)

courses in heat transmission, distillation, advanced mathematics, thermodynamics, physical chemistry, and a variety of other subjects. My own particular work at the time was concerned with production of products from petroleum fractions covering the entire gamut. We laid the ground work in this particular work at this laboratory with which I was associated that is now manifest along the Gulf Coast in the production of the so-called petroleum chemicals or petro-chemicals. Some of those are now covered by patents that originated back in those days.

Both granted and pending, I hold approximately 8 or 9 patents covering a variety of fields.

My first position after leaving M.I.T. was as chief chemist for the Frankfurt Distilleries in Louisville, Kentucky, whose principal products were whisky and gin, where I was so employed for four years. From there I went with the Wilson-Jones Company at a plant in Kansas City. They manufacture bookkeeping devices of all sorts and are the largest manufacturers of that sort of thing in the world. My original work was to rehabilitate a group of buildings covering almost a city block and suit them for various purposes; then to set up a manufacturing plant; finally, to operate the plant for awhile; and then after all of that had gotten on a normal operating basis, I was transferred to the [187] home office in Chicago as research director. From there I went to Charlotte, North Carolina as plant manager and chief chemist for a firm of manufacturing

(Testimony of Ralph Uhrmacher.)

chemists whose name was the Radiator Specialty Company. They used petroleum products in their various products. From there I went to Panther.

A satisfactory roofing primer requires a great many things to make it operate properly under the various circumstances that it may be subjected to before, during and after application. For one thing, it is desirable that it meet Federal specifications, because a considerable amount of primer is bought by the government and it is desirable to have a standard item that meets the specification, and, also, a great many purchasers insist on a product that does meet Federal specifications. Battleship primer meets Federal specifications.

(Objection to last statement of witness on ground Federal specifications would be the best test; overruled.) (T1095)

I am familiar with the American Society for Testing Materials, and we use their tests, although we don't necessarily use them exclusively. In a general way, I am familiar with their specifications for a cutback asphalt, rapid-curing type. Defendant's Exhibit 57 for identification are the A.S.T.M. requirements for rapid-cure type [188] asphalts, more or less for road work.

Voir Dire Examination (T1096)

Panther primer is not manufactured according to these specifications, but it falls in the general class. The cutback asphalt referred to in this specification is one of a number of types that is used in sur-

(Testimony of Ralph Uhrmacher.)

facing roads. According to the technical definition of our primer, it is a cutback asphalt. There is a similarity, it is not identical. For one thing, the type of asphalt used is generally different.

Defendant's Exhibit 57 admitted. (T1098)

Exhibit 57 refers to five grades of rapid-curing asphalts. The first two grades have no minimum requirements for flash point by this particular test, but Grades RC-2, 3, 4 and 5 all have a minimum flash point of 80 degrees Fahrenheit when determined by the Tag. open cup. There are no specifications in this exhibit for this type of asphalt in which the minimum specification of flash point is higher than 80 degrees.

The primary requirement of a roofing primer is that it is waterproof, since in a great many applications the primer itself is the only waterproofing layer. The next requirement is that the material should be absorbed into the paper, and at this point I should mention that so-called [189] roofing felts are actually types of paper. As those age, the original saturant in the paper becomes brittle and is lost. It is therefore desirable to replace that in order to maintain a roof in good condition. Frequently, the owners of a roof prefer to use a material like primer to restore the original degree of saturation and then cover that from the same material with a waterproof layer. Permeation is that particular feature of the primer that permits it to seep down into the fibers of the paper and do this waterproofing.

(Testimony of Ralph Uhrmacher.)

It is quite obvious that the material must spread easily, because it is used in the cold and the normal tool of application is a roofing brush, a device something like a scrub brush but the bristles are a bit longer.

Ductility refers to the coating that is left after the solvents have evaporated or the diluents. The material that is left must be flexible so that when the roof moves around, as it normally does a great deal, there will be no cracking and breaking of the film. It wants to be rather rubbery.

The primer should have a controlled degree of volatility, which deals with the rate at which a material leaves a surface. It is necessary to have some of it lost pretty rapidly, because if the rate of loss is too slow, on a warm day and a sloping roof, all of your primer would end up in the gutter. On the other hand, if the rate of evaporation is [190] too rapid, then the material would cure or become hard before it had a chance to penetrate into the fibers of the roof itself, and it is a question of balancing elements of the diluent component of the primer.

In determining the desirable flash point of this type of material, we use the system that is used by virtually all the manufacturers that I know of, and that is to abide by the I.C.C. regulations.

(Objection to any reference to I.C.C. regulations as forming any standard in the case; Court ruled expert might give reason for his conclusions.)
(T1103)

(Testimony of Ralph Uhrmacher.)

For materials of this type, the I.C.C. regulation requires that materials having a flash point, as determined by the Tag. open cup, shall be over 80 degrees Fahrenheit if it bears no warning label, or if the flash point is under 80 degrees, that it shall bear a red warning label containing certain prescribed wordings and be of a certain size.

(A continuing objection to the line of testimony was allowed by the Court.) (T1103)

There are other requirements for materials with flash points below 80 degrees, depending on the nature of the contents.

The 80 degree point is not only used by the I.C.C., but all sorts of carriers, such as Railway Express and the Post Office Department and the shipments by boat abroad. We [191] ship to a great many foreign countries and we operate similarly in Canada and they have similar regulations, and in every case the 80 degree point is the one at which the regulations require no warning labels.

The test procedure for the Tag. open cup method is outlined very exactly in the A.S.T.M. manuals. They put out a series of manuals covering various tests, and prior to making such tests it is always desirable to check each one of the requirements.

You have to use a specific type of apparatus. In this test, you have to carry out the determination in what is called a hood or a closet which has absolutely no wind movement in it. You can't maintain one of the little flames required in the test if there is any movement. The manner of heating, the rate

(Testimony of Ralph Uhrmacher.)

of heating, the size of the flame, and the amount of material in the cup are rigidly specified. The type of thermometer has to be of a particular nature, and you even have to count a particular number which takes almost precisely one second in order to encompass the time that is required when you move your flame across the surface of the material at a height approximately one inch above that surface.

Without going into each one of these little minutia, what you do is place an amount of material in a little glass cup and that is surrounded by a water bath, a [192] sort of double boiler setup, and the water bath is heated by a gas flame. Normally, you have to run a test or two on the material so that it will heat up at the proper rate, and the test requires that you allow it to cool down each time in order not to have errors creep in.

Finally, you put in a precise amount of material, the level of which is determined by a little piece of metal which projects below the height of the rim by one-eighth of an inch, and then with a precision-sized flame on the end of a little burner, you check for a flash at the one-eighth inch height above the surface as you raise the temperature. The 80 degree temperature when the flash is obtained is the temperature of the material. The temperature of the atmosphere has very little to do with determining flash points, unless ridiculous temperatures are involved.

Defendant's Exhibit 58 for identification is a sam-

(Testimony of Ralph Uhrmacher.)

ple of Battleship primer as we produce it at our various plants to send out for samples. It is taken from the same tanks as the production runs.

In the Tag. open cup test, it would be necessary to expose our primer to a temperature of 80 degrees long enough so that the primer itself achieved that temperature before it would flash. Then it would have to be in a draftless room at a height of no less than one-eighth of an inch above the surface of the material. [193]

When the flash point is reached, it is just the vapors that burn and not the material itself in the normal flash test. At times it does in certain tests, but the vapors flash first and then the fire goes from the vapors to the material in those cases. Ordinarily, that is what is called a fire test, which is a much higher temperature.

The vapors do not remain standing just over the top of this cup for an indefinite period, but they are constantly being lost.

Voir Dire Examination (T1110)

Exhibit 58 is not a sample of the primer from the shipment Mr. Segerstrom received, but a sample from normal production in the plant. I do not know when this sample was produced. The samples might be packaged at any one of a number of plants we have, all having been made to the same specifications.

Defendant's Exhibit 58 admitted. (T1112)

(Testimony of Ralph Uhrmacher.)

This sample is quite liquid and will run if tilted. It is about comparable to a thick paint.

(Defendant advised Court Defendant's Exhibit 59 for identification, pursuant to pre-trial procedure, was one of the samples taken of primer left after the fire.) (T1112)

Defendant's Exhibit 59 for identification is one [194] of the samples I received which I was informed had been taken from the primer left over after the fire.

Defendant's Exhibit 59 admitted. (T1114)

I am thoroughly familiar with Exhibit 59. To my knowledge, we never produced anything like that at any of our plants. I ran tests on this material.

Exhibit 25 contains our specifications for this primer. The contents of Exhibit 59 differed most markedly with our specifications in viscosity, which is the ease with which it would pour. Using standard test procedure, our requirements are that the minimum shall be 200 seconds and the maximum 240 seconds. Exhibit 59 had a viscosity of approximately 1100 seconds. I would say Exhibit 58 would comply with our specifications within the reasonable limits to be expected there.

It would be very difficult to spread the material contained in Exhibit 59 according to the instructions contained in the instruction book, but it is barely possible on a very hot summer day.

There are only certain types of oil fields that have the correct crudes to make the best type of roofing asphalt. You need the so-called asphalt crude. If it

(Testimony of Ralph Uhrmacher.)

is specifically suited to roofing purposes, we feel the best fields are those located in Oklahoma, Texas, Wyoming, Illinois, and I believe one Ohio field, and we have suppliers in each of [195] those fields. The material for the primer which we ship to the Northwest is produced in the Wyoming fields by the Standard Oil Company of Indiana at Casper, Wyoming, and that was the source of the material shipped to Mr. Segerstrom.

I have a familiarity with the process followed in the Casper refinery. I have been through a number of refineries and I have had the process explained to me, and I have been around oil plants off and on for a great many years, and am generally familiar with what is done in the refining process. In connection with my duties as research chemist for Panther, it is necessary for me to be familiar with the steps of production of this material. I have not been through the refinery at Casper, but I have seen similar ones and the basis of production is substantially the same in all refineries handling this type of crude.

In the general process of refining crude, to begin with there is generally a crude supply coming in, which I will show as a line (drawing on blackboard). That generally is under pressure. From this line there is a take-off by means of valves to that section of the refinery where the stills are located. A still is a device for putting heat under controlled conditions into a material and thereby allowing a portion of the material to be boiled off and leave

(Testimony of Ralph Uhrmacher.)

another portion behind. Ordinarily, in the refinery they use what are called continuous stills, so that this [196] particular action takes place on a continuous basis. Therefore the capacity of a refinery is not determined by how much any one still holds, but how much they are able to process each day. It is normal to put a so-called bank of towers, which is a refinery name for these stills, in one particular section where they will be well located, and we will set up a line of these over here (drawing).

The number of stills used is determined by the number of products one wants to take off, because according to the theory of distillation on a continuous basis, you may take off only one overhead product, material that boils over the top, and one bottom product. If you don't, you get a mixed-up material. I show five stills, but it can be six or more. We will assume that over here are heaters or furnaces, which are closely related to a steam boiler.

The crude then would come in by means of pumps to this furnace and from there to the still. These stills are very tall and the insides are divided into compartments so arranged as to have a large number of places where the material boils, evolves a vapor, and part of it is condensed and dropped back. Such an operation is called fractionization, and the idea is to try to get each particular material that comes off as nearly alike as possible. The material goes through one of these towers having an overhead and a bottom that comes back and goes to the next still, and this [197] process is repeated

(Testimony of Ralph Uhrmacher.)

until the final still has your residue coming off of its bottom.

On the first still, the lighter fractions come off first and boil over the top of the tower, which are then taken off and stored one place and the balance passes on through and the process is repeated. If the first portions contain too much of the material called casing head gas, which is now put in what is called L.P. gas, such as butane, propane and sometimes a little pentane, these are generally sent to a compressor plant where they compress these materials and put them in cylinders. This first product that comes off comes off in the form of a gas and has to be put under pressure to become a liquid, and that is the L.P. gas, which means liquified petroleum.

The next material which comes over is the raw materials from which gasoline is made. Again, after those are condensed, they are pumped to storage tanks situated a very considerable distance from these stills by reason of the fire hazard.

The next product generally is a type of material called a heavy blending naphtha, or it can be any of a number of so-called Stoddard solvents or whatever the particular refinery can sell.

The next material that would come off would probably be kerosene, and these are all overhead products, the [198] bottoms go on down the line.

Finally, the next section would probably take off a variety of burning oils and, depending on just how much sale they had for the different types, they

(Testimony of Ralph Uhrmacher.)

might divide them or fractionate them further in another set of towers. It is also possible to take some of these products, put them through a process called "cracking," and produce some more gasoline components.

The last still, in the case of a type of crude that has lubricating oil fractions, you would have lubricating oil mostly present at this end. In the case of an asphalt crude, you end up mostly with so-called residual or asphaltic material. In the form that it comes out of the bottom of the still, that is a type of road oil, but if you wish to make certain other types of products from that, then this material is treated further, frequently by putting a vacuum on the still so as to remove the necessity of very high temperatures. You can then remove volatile materials without exceeding a safe temperature. Then that material would go to a further processing setup. In the case of an air-blown asphalt, such as is used in roofing products, that is called either a blowing still or a blowing tower, and from there it goes on to another process.

In each instance, after the top has been taken off, the bottom has been passed down for further distillation. [199] When you get down to the bottom end in the last still, you have an asphalt, in the case of an asphalt crude. At that time, the asphalt is a viscous, thick, gooey and generally very smelly material.

The word "cutback" is used around a refinery to indicate the thinning out of a solid or semi-solid

(Testimony of Ralph Uhrmacher.)

material with normally a petroleum distillate to cut back its viscosity characteristic, to make it handle more freely.

Generally speaking, to obtain the primer we customarily sell, the first requirement of cutting back would be a tank, either a vertical or a horizontal one. The procedure is first to run in the calculated amount of diluent or solvent into this tank. Then at the bottom of the tank is a pump which takes the material off to any one of a variety of places as determined by valves. This procedure will vary from place to place, but, in general, this is the process used at all of the plants.

With the solvent in position, the next operation is to bring in the hot asphalt, generally around 350 to 400 degrees, depending on plant practice and outside temperature. In the case of products made of a blown asphalt such as ours, that is pumped from the blowing still. As the hot asphalt falls into the material, the pump picks up the material from the bottom of the tank, pours it over the top, and there is a certain swirling action so that you get mixing [200] both round and round and over the top. The idea is to mix thoroughly and completely. The general temperature at which the batch finishes up will be somewhere around 200, 250, perhaps a little higher. Normally, it will be at a minimum of 200 degrees.

At this particular stage, invariably, a sample is sent to the laboratory for testing. All petroleum products, and specifically asphalt products, are

(Testimony of Ralph Uhrmacher.)

made to specifications. Therefore, it is necessary to make sure that all batches are to specification. Sometime later, another sample is taken to see if there has been any change. If there has been no change, as soon as the conditions have become regular and uniform, then the entire set of analyses required against the standard specifications are run, and that determines whether or not the material may be shipped. In substance, other than the distillates, the specifications contained in Exhibit 25 are those that are taken at that time.

At this stage, you have completed making your material, then you have to get rid of it, which is one of the biggest problems around a refinery. You have to keep it moving; otherwise, it crowds up and tankage is at a premium around every refinery. So the next stage is either to send this to a storage tank or to ship it out. The material is always handled hot. It is normally shipped at a temperature of around 200 degrees. [201]

In this specific instance, the material is shipped from Casper to Denver.

In the case of shipments of primer to the Pacific Northwest, the material is received at Denver from the tank car or tank truck and pumped into a storage tank.

I was in Denver when we bought the place and I examined each item that was there. I had a great deal to do with the physical setup and am thoroughly familiar with the setup at Denver. The practices followed there are substantially the same as

(Testimony of Ralph Uhrmacher.)

are followed in other packaging plants around through our system.

After the material is received at Denver, it is pumped into the storage tanks, which are equipped with steam heating coils. The material normally loses about 10 degrees in transit. Asphalt loses heat very slowly and picks it up very slowly because of a number of characteristics, including its viscosity. When it is received in Denver, its temperature would be somewhere in the neighborhood of 180 to 190 degrees.

After being pumped into storage tanks, in the case of primer, the material as it is received is the primer, so for that purpose it is pumped from the storage tank through steam-heated lines to a packaging tank inside the building. The primer is the identical product shipped out of Casper and nothing more is added or taken away at Denver. In the [202] case of our asbestos roofing and cement, other materials are added to them to suit them to the specific end requirement. The basic product received from Casper is the asphalt component in most cases in the various other products.

The primer, being a very viscous material, the change in temperature is not aided by convection currents. When you are heating a material like water, which is thin, if you heat a part of the water, let's say, in the bottom of a container, that material becomes lighter and tends to rise, allowing colder material to take its place at the surface that is being heated. In the case of a viscous material

(Testimony of Ralph Uhrmacher.)

like asphalt, the sluggishness of it keeps it from moving. Consequently, one part of it can get very hot and a portion adjacent to it wouldn't show any change in temperature at all. Furthermore, materials like metals and also certain liquids like water transmit heat across themselves. This is termed heating by conduction. Asphalt does not have this property.

(Objection was made to reference to instruction in instruction booklet that material should be warmed by placing in warm room for 72 hours if too cold for application on ground booklet shows on its face it only applies to liquid asbestos roofing coat. Jury excused for noon recess, and there followed discussion between Court and counsel concerning instructions for application of Battleship products. The Court ruled neither side should have a witness [203] interpret the instruction booklet; that it should be left to the jury. (T1138-1144)

The noon recess was taken.

Tuesday, May 4, 1954, 2 o'clock p.m.

RALPH UHRMACHER

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued) (T1145)

Assuming that the primer in a 55-gallon drum had been chilled to a temperature of about 55 degrees, the best method to warm it would be to put

(Testimony of Ralph Uhrmacher.)

it outside in warm weather in the bright sun, because then you get the additional heating from the sun along with the air temperature to help it warm up. If that isn't available, it can be put into a warm room. With either method, about three days is a pretty good time to bring it up to the ambient temperature, normally.

The corporate name of the operating company of our Denver plant is the Motor Royal Company, but it is always referred to as Royal Oil Company. It is affiliated with the Panther Company and is under my general supervision, and I am thoroughly familiar with the workings there.

(Defendant advised the Court that Defendant's Exhibit 60 for identification was the report of the U.S. [204] Meteorologist on the climatic conditions during the months of March, April, May, June and July, 1953 in Spokane.) (T1147)

Defendant's Exhibit 60 admitted. (T1147)

Excerpts from Defendant's Exhibit No. 60

Local Climatological Data, Spokane, Washington (Geiger Field), shows the following temperatures: (July, 1953)

1953	Max.	Min.	Average
July 6th.....	89	53	71
July 7th.....	91	58	75
July 8th.....	87	62	75

I have examined Defendant's Exhibit 60, which gives the date, the maximum and minimum tem-

(Testimony of Ralph Uhrmacher.)

peratures, and the average temperature for the 24 hours of the data indicated. Then at the bottom of the tabulation there is the maximum average and minimum average for the month.

(The following temperatures were read to the jury by defendant: March, 1953: average maximum 49 degrees; average minimum 39.9; average for month 40.

April: average maximum 55.4; average minimum 35.8; average 45.6.

May: average maximum 64.3; minimum 40.5; average 52.4.

June: average maximum 67.7; average minimum 46.7; average for month 57.2.

July 1st, average temperature 61 degrees; 2nd, 67; 3rd, 67, 4th, 66; 5th, 66; 6th, 71; and 7th, 75.)
(T1148-1149)

Considering the testimony to the effect this primer was received the last part of March or the first of April; that during the winter the refrigeration room at the plant in question had been kept at 32 degrees; that the refrigeration [205] was shut off about the first of April; that this primer was placed in that room immediately upon receipt and kept there until the afternoon of the 7th of July at noon, when it was taken out and put in the sun on the south side of the building; that the room was made of pumice stone; that inside of that room there was 8 inches of insulation; that there was a ceiling 18 feet high, upon which there was 8 inches of balsam insulation and that over that a curved roof; and

(Testimony of Ralph Uhrmacher.)

bearing in mind the temperatures that have just been read which prevailed during this period; in my opinion, there would have been a very considerable lag in achieving the average temperature of the 7th of July in that room. It is a case of just an educated guess, but in my judgment it would lag approximately 10 days.

If left in that room for a period of more than three days, the primer would achieve the room temperature, whatever the room temperature would have been. If the room is warming up, the temperature of the primer would have some lag over and above the lag of the room in achieving the average temperature of the outside air.

Under those conditions, I should estimate the temperature of this primer would be within a few degrees of about 50 to 55 degrees prior to the time it was taken outside of the building on July 7th. At that temperature, it would have been thick and difficult to spread and handle. [207]

To have been applied readily, it would take more time than the procedure of taking it out about noon, exposing it to a temperature of around 90 degrees, leaving it there overnight and attempting to apply it the following morning. It would have had only time enough to pick up a little temperature, then it would tend to cool off again at night, so that the over-all effect would be minimized. Also, in the case of a material of that sort, the colder material tends to go to the bottom of a container. The

(Testimony of Ralph Uhrmacher.)

warmer material would be at the top and the colder material at the bottom.

When you arrange a drum to withdraw material for application, you try to give yourself the maximum amount of head, that is, the most level above the opening that you are trying to withdraw from. As a consequence, the coldest material will be around that opening that you are trying to draw from, whether it is drawn from the side or end of the drum. If the material were only partially heated, the warm material would be above the point you are trying to withdraw from.

As part of my duties, I arrange for the type of enamel placed upon these drums. It is a special type and is made under my supervision. The labels placed on the drums are also enameled. If the label on the drum were on the side away, with a radiating source of heat, and the rest of the [208] drum were exposed to it, the drum could attain a temperature of somewhere between 350 and 400 degrees without showing any visible effects of scorching or burning.

Defendant's Exhibit 61 for identification is an analysis I made of material sent from your office labeled "Segerstrom Primer, Sample B-1."

(Stipulated by counsel that Exhibit 61 was one of samples taken from bottom of drum on Rosenbaum place.) (T1157)

Or April 6, 1954, I ran a Tagliabue open cup flash test on this sample, viscosity at 122, distilla-

(Testimony of Ralph Uhrmacher.)

tion on the primer, and then a distillation on the solvent recovered from the primer.

The viscosity was 1196 seconds, according to my figure, as compared with a maximum of 240 permitted by our specifications, being many times higher.

I obtained a flash point of 94 degrees, which is what it generally runs in our primer, sometimes a little higher.

In the standard distillation on the primer itself, the first drop came over at 260 degrees Fahrenheit. The distillation receptacle holds about a pint of material and looks something like this (drawing). In that there is a thermometer inserted to a specified depth. Then you have a device called a condenser. This device is all glass and it is all [209] sealed. Cold water enters at one point and leaves at another, thereby condensing any hot vapors that come over. In this test, according to the standards of the A.S.T.M., the temperature at which the first drop comes off the end of this condenser is recorded as the first drop temperature. The data shown on Exhibit 61 shows the temperatures at which the various quantities came over into the receptacle. You read the quantity in the receptacle and then read the temperature.

Voir Dire Examination

(T1161)

Exhibit 61 was written up shortly after I made the original tests from some other notes. It was not

(Testimony of Ralph Uhrmacher.)

written since I arrived in Spokane. It was written up on April 6th, the date the tests were made. I threw the other notes away as soon as I made this copy. I didn't make up anything more formal than this, nor did I send anything to Mr. Graves. I think I brought it in my pocket or in one of my suits.

Defendant's Exhibit 61 admitted. (T1162)

The characteristics of the primer disclosed on Exhibit 61 would be a reasonable approximation of our primer at the time it is packaged and ready to be shipped to the customer, except that the viscosity is completely different and outside of the fact it is a little shy in total solvent.

Referring to Plaintiff's Exhibit 27 and to the red [210] line marked "Gasoline from roofing primer," with an initial boiling point of 120 degrees, a break in the middle, with an upturn and an end point of 330 degrees, the distillate portrayed on that exhibit is typical of the distillates used in our primer at the far right-hand end, but the left-hand end is a stranger. I mean by that, we require by our specifications that the initial boiling point be 190 minimum, so that if you would start at a point over there that reads 190 degrees, that is the lowest that the material could start to distill at.

You would have to add a very light material to our primer to obtain a distillation curve such as appears on Exhibit 27. If you look at the other curves on that exhibit, you will see they are all

(Testimony of Ralph Uhrmacher.)

smooth, there are no discontinuities in them and no plateaus. In distillation, as you get to the point where most of the more volatile materials have been removed, you reach a place where there is relatively little of the more volatile material and substantially all of the less volatile material in position. In that case, you get a rather rapid rise in temperature with a small amount of material being distilled over, the curve something on the order of this (indicating on exhibit), and then you start to get the effects of the less volatile material as a single component coming over where there is relatively constant temperature. Accordingly, whenever you get a curve that [211] doesn't go smooth like these do, you have no reason to doubt but that some strange material has been put in that has this characteristic on top of some other that has this one on it (indicating), let us say, and the material put in will bend this one down so as to form the slope there corresponding with the temperature change with the small amount of material that has been removed.

As a practical matter, the primer that we package for delivery to our customers could contain a distillate substantially lower than one with a boiling point of 190 degrees in quantities no greater than a drop to a full 55-gallon drum. It would be the merest trace, if you could determine it at all.

The reason for that is, in the first place, you start off with a material which has been put through a refining process so as to have stable characteris-

(Testimony of Ralph Uhrmacher.)

ties. The fractionating towers that are used at the refineries remove the light ends. They have a great deal more value to the refinery than for use in a cutback; consequently, they save them. Then, because the material is handled with agitation and at relatively high temperatures so frequently, any really [212] light ends such as the material shown on Exhibit 27 would be lost. Finally, the method of test is such that, unless there were very substantial amounts of the material in the cutback, the test procedure would tend to lose slight traces.

The starting temperature of the cutback mixing tank is generally whatever happens to be out in the yard. In warm weather, it will be one thing; in cold weather, something else. Generally, it will end up at somewhat over 200 degrees. That would boil out a material with a boiling point substantially less than 200 degrees to a considerable extent. It would remove probably the greater part of the material on the very lower end of the curve shown on Exhibit 27, certainly.

In determining whether a product should be labeled dangerous in the course of business, you always consider the flash point of the final product; you are not worried about the individual components.

I have distilled a distillate with a very low flash point off our normal beer. If you were to take a regular can of beer and put it in a special type of distilling apparatus called a fractionating column, you would remove a certain amount of a material

(Testimony of Ralph Uhrmacher.)

called acidaldehyde. This material boils at about 21 degrees, I believe, and flashes at about 58 degrees below zero.

We produce two materials that have flash points [213] below 80 degrees Fahrenheit. They are aluminum paints, one with an asphalt base, one with a synthetic resin base. Both of those are always labeled with a red warning label, as prescribed by the Interstate Commerce Commission.

For all the manufacturers that I am familiar with and the products that they produce, if the material is flashed below 80 degrees, they put a red warning label on it. If it happens to be a corrosive chemical so there is danger other than from fire, they put similar warning labels of appropriate nature on it. If, however, the flash point is above 80 degrees and there is no corrosive, there are no warning labels.

I recommend the type of containers for the shipment of our product, but I do not do the purchasing myself. I do make tests on them. I have handled literally hundreds of thousands of buckets such as Plaintiff's Exhibit 22. The bottom of the bucket is produced as a stamping from sheet metal, as are the sides, but the bottom is attached to the sides by a crimping method and with the aid of a sealing compound in a sort of a well, so that when the metal is turned to form a lock, the side of the bucket is sealed on both sides with a sealing compound. The sealing compound varies with the contents of the container and you must specify what you are going

(Testimony of Ralph Uhrmacher.)

to package in a bucket before the bucket manufacturer will produce buckets for you, because one sealing [214] compound and one type of inside finish will be suited for one material and be totally unsuited for something else. The sealing compounds are normally melted to be poured into the bottoms before they are assembled, and they will flow out again if you raise the temperature above that melting point. We will call this the side of the bucket (drawing); then the bottom of the bucket will have a shape something like this. The sealing compound is put into this little well right here, and then in fabrication this is slipped up in this fashion and then the whole piece is turned up so that you get a lock over here. The sealing compound actually seals the bucket and keeps thin material from coming out, and when that is melted out, then you have a tendency of having seepage coming through the pieces of metal. You can't make a perfectly tight seal from just the metal alone.

Assuming at the time of the fire the buckets which were being used on top of the stove were buckets that had been picked up off a dump and had either been used to carry paints or insecticides, and that those buckets for periods of approximately 10 minutes at a time were placed on the fire in a barrel stove with temperatures fluctuating from 300 degrees up to 900 degrees time and again over a period of a couple of hours, that would have a tendency to remove the sealing compound which I have referred to.

(Testimony of Ralph Uhrmacher.)

Assuming that during the same period, over the [215] same type of fire, approximately 55 gallons of this primer had been heated to the point it would have been heated if the buckets had been permitted to remain on the fire for 10 minutes each time, there would be a considerable tendency for the primer to have evaporated or volatilized. That same tendency would exist with reference to all other petroleum products that I know of; they all would tend to vaporize.

Assuming there was some seepage from the bottom of the bucket and droplets would fall into the coals, there would be a little flareup of fire at each point the droplets from the bucket would reach into the coals or some place where there was a flame. If the flareup were high enough to touch any portion of the vaporization which had reached a combustible stage, you would have a flash fire.

In pouring these buckets, you would normally expect a certain amount of the material to drip down the side. The material would tend to lose some vapor by the heating and there would also be a tendency to melt the residual asphalt material and have it run down the bucket. Then when the drop hit the coals, why it would flare up and have a little tongue of flame run up, just like a drop of fat.

There would be no relation between the temperature of the primer in the top of the bucket and bottom of the bucket under these conditions. In heating a material such as primer in the cold state

(Testimony of Ralph Uhrmacher.)

over a bed of coals, there would [216] be a tendency to heat only the bottom of the bucket and you would tend to have a hot core with an outside shell and a top that would be quite cold.

It would be impossible to heat any form of petroleum product over a fire that is flaming from time to time in a closed room without ultimately having a body of vapor form which will be combustible, irrespective of how high the flash point may be. As soon as you reach the explosive limits and if there is a source of ignition, something goes. If you follow this procedure long enough, inevitably you have a fire.

Cross Examination

(T1177)

In view of my last answer as affecting the need for a warning label on the material, you couldn't figure that anybody in his right mind would try to heat it over an open fire inside of a room. Outdoors it probably wouldn't be dangerous. It would be dangerous to heat the roof coating, any petroleum product, even axle grease, in the same way.

The roof coating is considerably heavier than the primer and more difficult to spread. Flash point determinations on material like that are rather difficult to get, but it would be somewhat higher than the primer.

It is possible someone might try to heat this material, but if they did, they would almost always do it outside. I have never heard in 25 years of anybody doing it [217] inside.

(Testimony of Ralph Uhrmacher.)

(Objection to the question: "But you recognize that somebody might try to heat this stuff?" as argumentative; overruled.) (T1179)

People will try to do all sorts of foolish things. I recognize the layman might try to heat the material, which is the reason the booklet says "Do Not Heat." That instruction is given, not because it would be dangerous, but if you heat roof coating, which is a very much more difficult material to heat than primer, you could ruin its waterproofing qualities. You can blow up a building if you boiled anything, including lubricating oil. Even water explodes, and terribly. Consider boiler explosions. It is not a flammable vapor.

From the testimony of Mr. Woods, I would say more than likely what happened was there was a gas vapor explosion caused by the fumes coming off of the material while it was being cooked inside of a building.

We didn't put anything such as "Do not heat inside a building" on the barrel; in our books, we say don't heat at all; that if you have to warm it, put it in a warm place. There is no warning label on the barrel, there is no need for them.

We comply with the I.C.C. regulations in the interest of safety, not because we are afraid of anything, but [218] we try to make everything safe, our plants and our products.

The purpose of a flash point test is to determine what temperature, under certain test conditions, will give a flash. This, in turn, is a measure of the

(Testimony of Ralph Uhrmacher.)

hazard of a material, but it does not indicate that the degree of hazard takes place promptly at the flash point.

It is the temperature of a particular material at or above which it is giving off inflammable vapors in sufficient quantities to form an explosive mixture under the conditions of the test, and no others. It would be a considerably higher range before normal conditions would take into consideration the test conditions.

In the petroleum industry, all materials that may be flammable under any conditions are handled with extreme caution, whether they are above, below, or at their flash point.

Flash point is the dividing line between hazardous and non-hazardous. A material having a flash point of 80 degrees could have a match held over it an inch above and not flash; if you dropped the match in it, it would flash. It wouldn't be hazardous unless an open flame came within one-eighth of an inch of the surface in a room without drafts. A little ways above 80 degrees, your flame would move up a few fractions of an inch. Above 80 degrees, the vapors might be going off and collecting and be subject to [219] explosion under unusual conditions.

I believe the I.C.C. requires containers for shipment of flammable materials to be of certain specifications, to be sealed in certain ways. Those with flash points at or below 80 degrees are to be labeled. Our specifications call for a minimum flash point of 80 degrees; we stay above that.

(Testimony of Ralph Uhrmacher.)

If there were a can of gasoline in a closed container sitting on a bench in this room, there would be no hazard as to that, providing it was perfectly closed. If there were an open can of gasoline, there could be a hazard if some flame or spark were introduced somewhere around where the gas vapors were if they were in the explosive limits. As to gasoline and substances in that class, the explosive range is roughly from 2 to 6 per cent of the vapor mixed with air.

I.C.C. regulations deal with shipments in closed containers, but containers get broken in shipment. The reason a manufacturer places warning labels on containers of flammable material so far as the ultimate user is concerned, he considers the way the material is going to be used and whether the ultimate user may get into a condition that might be dangerous. He knows the ultimate user sometimes doesn't have very much knowledge about these things, so that he should be warned under the conditions that the material is going to be used.

The primer in Exhibit 58 is our normal production; that in Exhibit 59 is what I received for testing; and there certainly is a vast difference. Exhibit 59 is a little deficient in solvent, we would never have passed it. It is not sufficient to account for the difference in itself. I believe the asphalt base is the same, though I did not make extensive tests on the asphalt.

I don't think it is possible that the material reached Mr. Segerstrom in that condition. Some-

(Testimony of Ralph Uhrmacher.)

thing must have changed it. I have never seen a primer that looked like that. I am not indicating that somebody put gasoline in this material; I just said what was present. The lower part of the curve on Exhibit 27 was not ours. I never tested the material that was sent to Mr. Segerstrom. I personally only make tests of this material about once every three months. My department controls the testing for the Panther Company. On most of it we only run a flash test and viscosity test, but Royal Oil Company have their own testing procedure. Of my personal knowledge, I don't know what the Standard Oil Company does at Casper, but I have personal knowledge of what Royal does. I don't think I was at Motor Royal in 1953, so I have no personal knowledge by being there personally.

The Panther Company in Fort Worth receives samples about every three months from the subsidiary companies, [221] and we run viscosity and flash tests, which is about all we feel is required.

These things normally aren't considered as having boiling points or boiling ranges. Our specifications call for a minimum initial boiling point of 190 degrees Fahrenheit on the solvent; Exhibit 27 shows an initial boiling point of 122 degrees.

I wasn't there, I don't know that this material wasn't fabricated by the Standard Oil Company at Casper with solvent having an initial boiling point of 122 degrees. I could only say that I have never seen any that had that. If we have a solvent that is highly volatile, there is a characteristic odor in-

(Testimony of Ralph Uhrmacher.)

volved. We handle so much of this material that we can tell a great deal from its physical appearances and the way it smells. If it had a highly volatile solvent, we would detect it almost immediately. We make no test to determine the initial boiling point.

Our specifications call for about 40 per cent solvent and a minimum flash point of 80 degrees. I don't think it is a correct statement to say that Standard Oil Company had to use what amounts to a gasoline as a solvent in order to bring the flash point of the entire mass of this material down to 80 degrees. If they particularly wanted to bring the flash point down to 80 degrees, they could use various naphtha cuts, although why they should want to, I [222] don't know. We permit them to bring it down to 80 as a minimum. If they accepted the invitation to bring it down to 80 degrees, they could use gasoline, but they wouldn't because gasoline is worth more money than naphtha. At every refinery gasoline is the most valuable product. Gasoline does not cost less at the refinery than a Stoddard solvent.

If the refiner wanted to do it for some reason, he could be conforming to our specifications in cutting this asphalt back with gasoline. We would find it out immediately that we checked it. With reference to my tests, I test sample productions every three months.

A primer with a flash point of 120 degrees would be unsatisfactory, because it would cure so slowly

(Testimony of Ralph Uhrmacher.)

you would have trouble with it running off of sloped roofs.

We don't have any solvent with the nature of gasoline in it. I think Mr. Kniseley probably got correct results with the material that he had. Possibly there are some gasolines with initial boiling points of 190 degrees.

A road asphalt has different properties than the asphalt portion. The solvent portion may be similar, as well as the viscosity and flash point. Those are the only tests we run every three months on the samples from the subsidiary companies. We would know it if the manufacturer were selling us an ordinary road asphalt from our tests. A road asphalt is one of the cheaper products of a refinery.

The Motor Royal Company package this material and also test it as it is received and check to make sure it is the right material and the right grade in the chemical laboratory right on the premises. I didn't tell about the tests made by Motor Royal on my deposition because you didn't ask me. You asked me, personally, what I tested on it and I told you. Motor Royal receives this material in tank cars from Standard Oil Company at Casper, Wyoming; they put it in these drums, label it and ship it out.

The drum that Mr. Segerstrom received could have had the material that Mr. Kniseley found in it without my knowing it, but Motor Royal probably would. They have always done their job in the

(Testimony of Ralph Uhrmacher.)

past and they have a very capable man doing the testing.

The sample on which I made tests was taken from the bottom of the barrel. It is not true that if there was any separation at all in that barrel, the heavier asphaltic types would go to the bottom and the volatile parts would come to the top.

On my deposition taken April 26, 1954, I did state that I did not have the results of my tests with me in Spokane. At the time I had forgotten when you said Spokane that my bags were at the hotel and I had the tests there.

It would be a very unusual situation where you would have to heat the roof coating to the same extent as the [224] primer, but the same normal procedure would apply. It should be placed in a warm room and should never be heated over an open fire, and it would be a reasonable precaution not to have any fire around it. A fire could be somewhere in the immediate vicinity of the roof coating, but not underneath the barrel or right close to it, as that could be dangerous under unusual conditions and it is just being safe.

Plaintiff's Exhibit 62 for identification is a sales manual put out by the Panther Company and distributed to their salesman. I presume it tells them how to sell this product, I haven't read it. I have seen it.

Plaintiff's Exhibit 62 admitted. (T1214)

(Plaintiff then read the following from Page 93 of Exhibit 62: "Be sure that the temperature of

(Testimony of Ralph Uhrmacher.)

Battleship is raised to a normal temperature of around 55 to 60 degrees. It can be done in one of the following ways. (a) Place the Drum of Battleship in a large galvanized iron wash tub, fill the tub with water—then build a fire outside the tub. The flames should not come in contact with the drum itself, because too high a temperature causes the waterproofing oils in the roof coating to congeal, thereby destroying its waterproofing qualities. Builders Naphtha may be used to thin Battleship if none of the above methods prove entirely satisfactory. However, Kerosene, Gasoline, or other solvents must not be used under any circumstances.”)
[225] (T1214-1215)

I am an assistant vice-president of the Panther Company.

A small portion of the solvent has to evaporate more rapidly than the rest. Since water boils at 212 and our initial boiling point is 190, then if you want to call water volatile, you could say there must be something of a highly volatile nature to evaporate rapidly. A portion of the solvent must volatilize with reasonable rapidity, about like water would, not like gasoline. Water is comparable as to volatility, but not as to flammability. There must be something in there that is more volatile than a safety solvent, such as one of the higher-boiling naphthas. If a petroleum product has a very low boiling point and is high volatile, it is hazardous. This would not be considered a highly volatile ma-

(Testimony of Ralph Uhrmacher.)

terial. I definitely would say that the solvent shouldn't evaporate slowly.

On my deposition, I probably said you want the solvent to evaporate slowly, but it was comparing the terrific volatile flash of gasoline and I was giving you a comparison at the time with gasoline.

I went down to the University of Idaho's laboratory last week and ran some tests on another sample to see how the tests compared with the ones I had run back in Fort Worth. I ran flash tests at that time and they ran about [226] the same, either 93 or 94, the lowest one being 93. I did not keep a record of these tests.

In my opinion, the primer couldn't have been in the form of Exhibit 59 when Mr. Segerstrom's men were applying the material. Something has occurred to change this material since it left the plant. On my deposition, I stated it was possible the material had that viscosity when it was opened for use.

It is true that occasionally these asphaltic materials will jell or thicken in the drums after a period of time. It can occur on very rare occasions. The amount is generally very slight. In my experience, it has only increased in viscosity approximately 50 seconds, I believe, over our high maximum. A purchaser may find it thicker in the barrel than when we put it in to a slight extent. In my experience, the material has never gotten to a condition where you couldn't put it on as it came from the barrel. If it is necessary to apply it in cold

(Testimony of Ralph Uhrmacher.)

weather and the person doesn't want to wait until it warms up, very frequently people that know what they are doing will use certain thinners. We don't put warning labels on the barrels for the reason we have never run into cases where they showed any need of having them. The material has been used by all sorts of people. We haven't had anything remotely resembling this incident happen. [227]

Redirect Examination

(T1225)

(Objection was made to a question as to the testing procedures followed at the Motor Royal Company on the ground the witness did not know of the same. Court ruled he might testify as to the program he set up.)

Voir Dire Examination

(T1226)

I am not an officer of the Motor Royal Company, nor am I employed or receive any salary from that company. I was there last about a month ago. Prior to July 8, 1953, I think I was there around April of 1952. Since I am in charge of the laboratory for the Panther Company, I regulate the manner in which the production concerning products handled by subsidiary companies is carried on. This primer is produced by the Motor Royal Company to our specifications. I am not familiar with whether it is done on a contractual basis.

(Objection renewed.) (T1227)

(Testimony of Ralph Uhrmacher.)

Redirect Examination—(Continued) (T1228)

I fix the procedure and test methods on all the products that are handled by Motor Royal Oil Company.

(In a conference before the bench between Court and counsel, the Court ruled the witness had not shown sufficient knowledge of what was done by other company.) (T1229-1230) [228]

With reference to the instructions which were read from Exhibit 62, that is a safe practice for hastily warming any of these materials. The water can reach a temperature no higher than 212 and the container is closed and the flames are away from the container, which has no relation at all to the procedure adopted by Mr. Rosenbaum in this case.

Recross Examination

(T1231)

The instructions refer to the drum of Battleship and it would be assumed that the drum was closed. People would normally keep the drum closed in that condition, anyway, to keep the water from getting in. It doesn't say anything about its being explosive or being liable to explode or anything of that sort. If the material were heated up to 212 degrees with the drum open, I shouldn't think it would be an explosive situation. It wouldn't be giving off a lot of vapor under these conditions. In the first place, it heats through slowly and the amount of opening involved is small.

(Testimony of Ralph Uhrmacher.)

The following questions were asked and answers given on my deposition:

“Question: Well, other than designating the quantities to be produced and the manner of packaging and the manner of shipping at your order, and so on, and telling that company it is to produce it according to these specifications, do [229] you have any other control over the actual fabrication of the material?

“Answer: Well, we periodically receive samples of this manufacture to check them against our specifications.

“Question: Yes, but otherwise any other control?

“Answer: No direct control from my particular point of view.

“Question: In other words, your company doesn't have a man constantly at the Motor Royal plant or the plant of any of their subcontractors to determine just what is being done in the actual fabrication?

“Answer: Not on a continual basis.

“Question: Do you largely confine yourself to checking after it is manufactured?

“Answer: That is customary in virtually all manufactured products.

“Question: And that is what you do?

“Answer: Yes.

“Question: And how do you conduct those tests of the primer that they are fabricating for you? Do they ship a barrel from time to time, or——

(Testimony of Ralph Uhrmacher.)

“Answer: No, they normally ship us a sample from a production run.

“Question: From a production run?

“Answer: Yes. [230]

“Question: From each production run?

“Answer: No, not necessarily from each one, on a sampling basis, using a statistical method of arriving at the proper amount.

“Question: So you don’t get a sample from each production run?

“Answer: We do not, no.

“Question: How often do you get a sample?

“Answer: Oh, I would say about once every three or four months, possibly.

“Question: And that would be the situation that prevailed in 1953?

“Answer: I should think so.

“Question: I suppose once, then, in three or four months they may have run several production runs of this material?

“Answer: I would imagine so.

“Question: Yes. And I take it, then, that the Panther Company or any of its immediate employees do not see the material at all except from the samples that are periodically received?

“Answer: I would think so.

“Question: In other words, the Motor Royal Company fabricates it, puts it in the barrels, affixes your forms, and ships it to your—— [231]

“Answer: That is right.”

HOMER M. SCHAUER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1237)

My name is Homer M. Schauer; I live at Casper, Wyoming. I am 32 years old, married, and have one child. I have been in Casper since April, 1952.

I am a chemical engineer employed by the Standard Oil Company of Indiana, and was so employed through 1952. I received a degree of bachelor of science from Iowa State College. Upon graduation, I was employed by the Presto-Lite Company in Indianapolis, Indiana for about six months in the manufacture of acetylene in the laboratory. I graduated from college in 1943. From the Presto-lite Company I went in the Navy and was discharged in 1946, at which time I went to work for Standard Oil at their refinery at Whiting, Indiana in the technical service laboratory in work connected with light oil processes, finishing and waste disposal. A certain nature of it was research work. From this employment I was transferred to Casper where I am a supervisor in the chemical laboratory.

There are between 45 and 50 men employed in the Casper laboratory and about 700 to 750 men employed in [232] the plant, which covers an area about a mile long and a half a mile wide situated on the North Platte River and part of which is inside the city limits.

Crude oil comes to the refinery from storage

(Testimony of Homer M. Schauer.)

tanks outside the refinery which is then put into the distillation process. Our crude comes from the Wyoming fields. We have two types we run there; one is a black or asphaltic crude from which we make our asphalts; the other is a green crude, from which we make our lubricating oils. These types are kept in separate storage tanks and we use different units for running the different type crudes and different products are obtained.

The crude is brought from the storage tanks into the still. A still is 10 foot in diameter by 40 foot long and it is horizontal. There are 5 stills in a series where we heat the crude up for distillation. We have two series in the plant that are used for processing crude. The stills are heated by a gas fire. The crude moves from one still to another as we are processing it.

From the first still we get a light naphtha, which includes our liquid petroleum gases. They come off together and when you cool it down, the light naphtha condenses, but the gases will go overhead to a compression plant. We don't sell bottle gas in our refinery, we send it to the fuel system. We pump the light naphthas to an [233] area which we call "Light Oils Finishing and Blending," where they are treated and blended into gasoline.

Gasoline which is sold for use as motor fuel does not come directly from the stills, but is made by another process after the distillation.

The material then moves to another still by

(Testimony of Homer M. Schauer.)

means of gravity. There is a difference of about 100 degrees in temperature between the first two stills, the first still being between 150 and 200 and the second one 250 to 300. Here the heavy naphtha comes off, part of which is used for cutback asphalts and part of which is used in other special products.

From the next still we get off kerosene, which we finish further and sell as kerosene.

From the last still, we take off a fraction which we call gas oil, which can be compared to a lubricating oil, and we process it further in a cracking operation to make gasoline and other products.

When the fractions come off, they are a vapor. Inside a closed system, you have a tower coming over the top of the still, which is a pipe, and this pipe goes through a big box with water in it and there it is cooled down and the vapors condense and flow down to a tank.

At this point, we have gotten everything off at the fifth still. We then heat the reduced crude up through [234] a furnace and pump it into a vacuum pipe still, which is under vacuum, and then more gas oils come off and we get off the bottom products, which are asphalts.

Each still has a furnace underneath them for heating, a gas-burning furnace, and the stills themselves are closed stills. In every case, these products come off in the form of vapor which is later condensed. The stills are on concrete foundations and each succeeding still is a little bit lower than the

(Testimony of Homer M. Schauer.)

preceding one, permitting a gravity flow from one still to the next.

When we have gotten down to the asphalts, we make various types of asphalt bases. The operation of this vacuum pipe still gives us different properties. Our lighter asphalts we take and subject to a blowing operation which will make roofing asphalts out of them. We use another still for this process in our refinery which we fill with this asphalt material and then blow air through it at temperatures ranging from 490 to 500 degrees. We have an air system which has 100 pounds pressure and a valve between the air system and the still, and the air goes into the still through a pipe with holes in it where the air comes out and goes up through the material. The pipe curves back and forth several times so that it goes through the entire mass of asphalt. This process changes the properties of the asphalt. It becomes harder, tends to become more viscous, actually will [235] become a solid at normal temperatures. It is blown at elevated temperatures in its liquid form. We maintain the still at a temperature from 300 to 350 degrees Fahrenheit and ship the asphalt directly from the still.

We have various customers for whom we make various asphalt preparations to their specifications.

A cutback asphalt is where you take a solid asphalt, which may be a straight vacuum-reduced product or one of these blown asphalts, and cut it back with a diluent. We have two diluents we use,

(Testimony of Homer M. Schauer.)

one is a naphtha and the other is a kerosene. The cutback made with kerosene includes medium-curing asphalts which are used for road surfacing.

The gases from the first still are sent to the compression chamber and the light naphthas go to the light oils finishing and blending area, which is located probably 2 or 300 yards away from the still, by means of suction pumps. The kerosene also goes to the light oils finishing area. The heavy naphtha goes to the cutback plant. Next we have the gas oil which is pumped over to where we have our cracking units located about 300 yards from the still. Finally, there are the two categories of asphalt, one that is blown and one that isn't. Our blown asphalts are more desirable for roofing purposes. I would say the solid asphalts are used for hot roofing, while cutback asphalts are used in cold roofings. [236]

The blowing tank for roof asphalts is in the same line with the crude stills about 100 feet away. It is just an old crude battery which we have converted to blowing stills. It is an enclosed still with a vent on it. The temperature at which the material is pumped into the blowing still will vary. We will put it in about 200, 300 degrees, as long as you can pump it. We use steam pumps for this purpose.

In making the cutback asphalt, we have what we call a cutback mixing plant, consisting of a number of vertical drums about three and a half by 30 feet high. First you put in the amount of solvent or diluent to make up the batch, and then you start

(Testimony of Homer M. Schauer.)

circulating naphtha from the bottom to halfway up or clear to the top, however you want to do it. At the same time, you start pumping in the asphalt which is generally at a temperature around 300 to 350 degrees. We pump the asphalt into the same line as where the naphtha is being circulated and your still will gradually fill up to the level which you have pre-determined. After being filled to this level, it is circulated for about an hour or more. Usually at that time, it is about two hours since you started the operation. We are circulating from the bottom of the still, where we can go near the bottom, the middle or the top.

At the end of two hours, we take a sample and send it to the laboratory to see if it meets our viscosity [237] specification. If it is not in the specification range, we have to either add a little more naphtha or a little more of the asphalt. Once we get into the viscosity range after circulating, then we make a complete test on the tank, which includes all the tests specified by the customer. In the case of the Panther Company, we run a flash test, distillation test, viscosity test, and certain tests on the residue from the distillation which have to do with penetration and softening point. It generally takes a whole day to run those tests. We quit circulating after we get it on the viscosity specification, but the material is left in the tank until the tests are completed.

If the material does not meet the viscosity range, we can again add more naphtha or asphalt to bring

(Testimony of Homer M. Schauer.)

it back into specification. If it is penetration or the residue is way off, then we will have to slop the batch. We send it to a tank which we call a slop tank, and from there we can send it to a coking operation, if it is heavy asphalt. It is all recovered as some type of product. Other than the viscosity specification which we can remedy, if a batch does not meet specifications, it never again goes back into the cutback asphalt plant.

At the refinery, we consider gasoline a finished product which is sold as a motor fuel. We take these naphthas from the crude running unit and treat them and blend [238] into gasoline, along with naphthas from cracking operations which have been treated and air blended into the gasolines.

The area where gasoline is compounded is 200 yards away at the closest point from the cutback asphalt stills. It would be physically impossible for gasoline to ever get into the cutback asphalt at our plant, because there are no lines going over that way. The various products are transported from one place to another in the refinery through pipe lines controlled by valves, most of which pipe lines are underground. It would likewise be impossible for any of the components of gasoline to reach the cutback asphalt stills.

At the conclusion of the mixing of the cutback asphalt, any foreign substance therein would be disclosed by the tests and the entire batch would be slopped. Another sample is taken when delivery is made to a tank car or truck. The sample is taken

(Testimony of Homer M. Schauer.)

when the vehicle is about two-thirds loaded and a viscosity test is run and a check made to determine if there is water present.

I have drawn a diagram on the blackboard indicating the physical arrangement of our refinery and the relative locations of the several processing units. The plant itself is one mile long and about a half a mile wide.

At our refinery, gasoline is the most valuable product we have. Thus, we make an effort to make everything we can into gasoline. Naphtha is one of its cheaper [239] components and only a certain portion of it can be used due to its low octane. In oil chemistry, "naphtha" is a term for a general class of products which originally come off the crude still. They generally boil in the range from 100 to 400 degrees Fahrenheit.

(Court adjourned until 10 o'clock a. m.,
Wednesday, May 5, 1954.)

Wednesday Morning, May 5, 1954, 10 o'clock a.m.

HOMER M. SCHAUER

having previously been sworn, testified further as follows:

Direct Examination—(Continued) (T1276)

There are six mixing tanks of a capacity of about 14,000 gallons each in which the cutback asphalt is mixed. The storage tanks have a capacity of about 36,000 gallons. Each tank and drum is numbered

(Testimony of Homer M. Schauer.)

and when samples are taken for testing purposes, each sample refers to the drum by number and a permanent record is kept of the analyses by drum numbers. When the sample is taken during the loading operation, it again refers to the tank from which it was taken.

The complete analysis is sent to the plant at Denver [240] by mail after each shipment is made. The driver of each tank truck also has a shipping ticket showing the viscosity and the amount. Our company has the originals of the analyses made of each separate drum as the mixing is completed, and I have those here with me.

I have also prepared a synopsis of the analysis sheets of the shipments that were made to Denver.

Defendant's Exhibit 63 for identification is the analysis sheets for each batch of primer for the Royal Oil Company at Denver beginning in September of '52 and terminating at the end of March in '53.

Voir Dire Examination (T1285)

The Motor Royal Company is our only customer of this material. Each of the pages of Exhibit 63 for identification represents tests from one batch. I have no way of knowing whether the material purchased by Mr. Segerstrom came from any of these particular batches, nor do I know how long the Motor Royal Company may keep the material on their premises.

We don't make any roof coating, we just sell that material there and we have our formula number for

(Testimony of Homer M. Schauer.)

it. We don't call it a primer, either. I don't know what they use it for or sell it for at Denver.

Defendant's Exhibit 63 admitted. (T1289)

CK87 is our formula number for this particular mix, and it is made exclusively for the Royal Oil Company in Denver and was sold only to them during the period in question.

The lowest flash point of any of the batches made over this period of time was 90. If the material does not flash at 95, we don't go any further.

Exhibit 64 is two typewritten sheets headed "Summary of Specifications Reports on CK87", which I prepared myself from the specification records contained in Exhibit 63 and others not offered covering the period from August 1951 to May of 1953.

(Objection was made to the introduction or use of Defendant's Exhibit 64 for identification, and the exhibit was withdrawn.) (T1290-1292)

There is no physical connection between any of our gasoline operations at the refinery and the cut-back storage tanks.

In my research work, I have never attempted to mix gasoline with this asphalt preparation, but I have read what may happen.

(Objection was made to witness stating information obtained from literature; overruled) (T1294)

In such mixture, you may get a precipitation or jelling of the asphalt. [242]

Referring to the red line on Plaintiff's Exhibit 27 marked "Gasoline from Roofing Primer," the sol-

(Testimony of Homer M. Schauer.)

vent diluent which produced that test could not have gotten into this asphalt at our plant. This line looks as though it is a mixture of two different materials. The distillation of all our products is similar to these other lines up here on Exhibit 27. They are very straight and don't have this breaking point in here. Our diluent begins to boil above 200 degrees Fahrenheit. This point with the sharp break upwards indicates you have some material in here that boils rather low and, when you boil that material out, you get a rapid rise to a higher boiling material.

In research work in our laboratory I have made graphs similar to this of the diluents used in this cutback asphalt. They have these little dips on the front and on the back end, but it is similar to one of these curves on the top with no break in the middle.

Cross Examination (T1296)

The Motor Royal Company is the only one for whom we manufacture this CK87. Of my own knowledge, I don't know what they use it for. We manufacture other roofing materials at our Casper plant, but not these cutback roofing materials nor other so called cold roofing materials. We do put out materials which we call corites that are blown asphalts which are sold to various customers. They do not contain a solvent [243] and are what is known as a hot application or hot type asphalt.

The asphalt base of CK87 is blown. We put out road asphalts at Casper. The asphalt base for road

(Testimony of Homer M. Schauer.)

asphalt is not blown and it is much softer and contains more fluid. The blowing tends to make the asphalt more viscous. Aside from the blowing, this CK87 material is manufactured in the same way as the road asphalts by taking an asphalt base and blending it with a diluent, but not in the same proportions. It depends upon what type or grade of road asphalt you want. There are some road asphalts that are about the same proportion of asphalt base in diluent as CK87, but the tests are all different.

A flash test is supposed to be a measure of the hazard of a material. Under certain test conditions, it is the temperature at or above which the material is giving off flammable vapors in sufficient quantities to form an explosive mixture with the surrounding air. I don't believe those test conditions will give an indication of what would happen under normal conditions.

If a test showed a material had a flash point of 50 degrees Fahrenheit, a container of that material standing open in a room with conditions favorable in all other respects to an explosion would be giving off vapors which could form an explosive mixture with the surrounding air at temperatures above 50 degrees.

I don't think that flash point is supposed to be the dividing line between the temperature at which a material is safe and the temperature at which it is dangerous. With a material having a flash point of 50 degrees, under your test conditions you can get a flash if you put a spark or flame an eighth of

(Testimony of Homer M. Schauer.)

an inch away. If there were a spark way in the back of the room, you wouldn't get a flash.

This material at 50 degrees would be giving off vapors which would be combining with the surrounding air. If the temperature is hot enough and depending upon the conditions that may surround it, it can combine with the surrounding air in sufficient quantities to be subject to being ignited even at a distance away from the container. The more it rises above its flash point, the more vapors that are being given off and the more the likelihood is there will be an explosion.

Flash point is a relative test. I will agree that a material having a flash point of 50 degrees can flash at room temperature. Whether a material is to be regarded as dangerous above its flash point depends upon how it is going to be used. It gives you an indication of the danger involved and there may be hazard above that temperature, depending on just how the material is handled.

I don't believe I am qualified to answer what [245] precautions are taken in industry when materials are handled above their flash points. At our refinery, we take precautions all over.

I have never heard of the National Fire Protection Association or its Handbook of Fire Protection.

The only tests we make of this material are those shown on the sheets forming Defendant's Exhibit 63. After it is mixed and we find the viscosity is in the right range, we run the complete test. When

(Testimony of Homer M. Schauer.)

the material is being loaded into the tank car or truck, we run a viscosity test, a specific gravity test, and test to see if there is water present.

At our refinery, crude petroleum is pumped into the stills from the storage tanks located across the river. Those storage tanks contain crude oil from many different wells. The fields from which we obtain the crude may be 200 miles away, and the oil comes from the fields in pipes and those pipes merge into one line that is directed into one of these storage tanks. The crude petroleum is then pumped from the storage tanks into these stills and is run through the stills.

From the first still is taken all the very lightest, most volatile parts of the crude. A small portion of the product of the first still is a true gas which cannot be converted into a liquid, and this is sent to the [246] compression plant where the pentanes and butanes are removed and the balance used to feed our furnaces, and so on. For the most part, what is condensed out of the first still ultimately becomes gasoline.

The cutback asphalt is made from the second still, from which point it is sent to intermediate tankage and from there to the cutback tanks if it is to be used for cutback asphalts. If it is not, we can put it into different tanks and blend it and put it in distillate fuels such as heating oils and furnace oils. Sometimes the product from the second still is sent up to the gasoline manufacturing area to be

(Testimony of Homer M. Schauer.)

used in making gasoline, but we very seldom make gasoline out of it.

Before the product of the second still is used in the cutback asphalt, we run a distillation test on it and gravity to see that it is within certain limits. This product will vary, largely depending on how the still is operated as to temperature. The product is made so that its distillation characteristics are very uniform.

The cutback naphtha is made to specifications on the still. We have our own specifications for that. The operation of the still is adjusted to get a certain product at a certain time. The cutback tanks are always filled from the second still and never from the first still as the piping is not connected that way. [247]

By adjusting operations, the product of the second still can be blended to a gasoline. I rather doubt that the product of that still would run a motor car by itself. It would be a very poor motor fuel and I doubt whether it would run an automobile uphill because of its low octane. Raising its octane would not produce a satisfactory motor fuel, but it might run a car.

The "knock" produced in a motor through the use of a low octane fuel is occasioned by pre-ignition or the fact its starts burning before the spark hits the mixture. It is not true that the higher the octane rating, the slower the fuel burns. By increasing the octane rating, you are decreasing the tendency for the fuel to pre-ignite in the combustion

(Testimony of Homer M. Schauer.)

chamber. Gasolines with lower octane ratings will flash without a spark, and when you increase the octane rating, you make the fuel harder to ignite.

One of the reasons the product of the second still is not desirable as a motor fuel is because it ignites too readily. There are a lot of other differences. On a cold day you would never get that material to start a car. You would have to add butanes to lower its flash point down into winter temperatures. On a real hot day you might get your car started with this material.

The material from the second still is heavier than gasoline, but it would have a boiling point within the range [248] of gasoline. Its distillation characteristics would differ. It can be a component of gasoline, but it is not a gasoline according to our definition in a refinery.

(The witness was temporarily withdrawn.)

ELWIN BRADBURY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1325)

My name is Elwin Bradbury; I live at Rathdrum, Idaho, about 30 miles from Spokane, where I am employed as a janitor and bus driver at the Rathdrum schools. I have charge of the building maintenance.

In the spring of 1953, the school district furnished me about 30 gallons of Battleship primer

(Testimony of Elwin Bradbury.)

and roof coating, which I applied to the school buildings in probably October or November. I applied the primer with a brush and covered different leaky parts of the roof. The material had been stored right off the boiler room in a fairly warm place since its receipt some six months prior to its use. I experienced no trouble in spreading it and it was all satisfactory. Later I used the roof coating to patch leaks in the colder weather. I still have some of the roof primer and have used it to patch leaks in cold weather while keeping it in a warm room. [249]

Cross Examination (T1330)

This primer was kept off the boiler room where the temperature was probably 80 degrees and was kept there for some time before I used it. It was applied in the fall directly from the barrel and I had no trouble with it.

Redirect Examination (T1330)

I carried the 5-gallon container up on the roof for application.

Recross Examination (T1331)

I took the material up through the building.

HOMER M. SCHAUER

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued) (T1331)

In our plant, we don't consider anything gasoline

(Testimony of Homer M. Schauer.)

except what is sold for motor fuel. Until it is actually in a tank to be sold as motor fuel, we call it something else, naphtha or something like that.

I have read that if asphalt is cut back with gasoline, it will tend to jell the asphalt, and over a period of time it will tend to make it become more viscous. Gasoline has the light components, like butanes or pentanes, and it can cause it to jell. There are only minute quantities, a [250] few drops in a barrel, of light ends in the product of this second still. If you took a fractionating column, a very precise piece of equipment, you might get a drop of light ends from the product of the fourth still. If you re-distilled the product of the fourth still, you could get off a small amount of material that could be put into gasoline.

If you re-distilled the product from the second still, you might find one drop in a barrel that would have a boiling point of 120 degrees Fahrenheit. Butane has a boiling point of 33 degrees Fahrenheit at standard conditions. What I refer to as light ends are the butanes and propanes. By fractionating the material from the second still, you would get a few drops of butane or propane, materials having boiling points around 30 degrees Fahrenheit. Through the use of the most precise method of extraction, I would say you would get about 1 per cent of material having a boiling point of around 120 degrees Fahrenheit. (T1337)

The small portion having an initial boiling point of 120 degrees from the second still would not pro-

(Testimony of Homer M. Schauer.)

duce the red curve shown on Plaintiff's Exhibit 27 according to the A.S.T.M. procedure. There would be portions in there that would have boiling points of 120 degrees, but they would not show up on an A.S.T.M. distillation. Having taken the material from the primer by steam distillation, you could develop from that material an initial boiling point in the [251] range of 120 degrees Fahrenheit by certain test procedures, but not by this A.S.T.M. method.

If the viscosity of a material of this sort that we are talking about remains the same over a period of two months, while the material is in a closed container and at a standard temperature, the possibility is very great that no solvent has been added. It is possible that you could add solvent and not thin the material.

The material we mix for the Royal Oil Company is not the cheapest product of our refinery. I believe our heavy railroad fuel oils are probably the cheapest product. I know the cost of this product at the refinery, but I do not know what the sales prices are. Its cost would run between five and ten cents a gallon to manufacture.

This material could not be manufactured with a so-called safety solvent because it wouldn't meet the distillation requirements. I don't believe it could be manufactured with a safer solvent, higher flash solvent, or with a solvent in the category of a Stoddard solvent. I don't know whether the addition of small quantities of carbon tetrachloride would make

(Testimony of Homer M. Schauer.)

it safer or not. I never heard of it being added to roofing materials.

In manufacturing this CK87 material for the Royal Oil Company, the asphalt, before it is cut back, has a flash point of 400 to 500 degrees Fahrenheit. We can't use just any [252] solvent when the customer allows a flash point as low as 80 degrees, because the distillation properties we have to meet determine what we have to put in there. You have to design a solvent that has certain distillation properties, and once you get that solvent, its flash point is set. I don't think you could use gasoline as a solvent because you wouldn't meet the viscosity and still be above that flash point of 80 degrees.

When the material is shipped, we don't make any tests to determine the initial boiling point of the solvent or its other characteristics.

Both the line to the gasoline section and the line to the cutback tanks from the second still are controlled by valves and pumps and there could never be an open circuit between the two. The lines are flushed out once in 25 years only and possibly once a year if we shut a battery down.

There are naphthas that flash above 80 degrees Fahrenheit. We make a Stoddard solvent that flashes at 103 degrees at Casper elevation, which I believe is the highest we make. There are other naphthas which flash higher than 103 degrees. The tests shown in Defendant's Exhibit 63 are run according to the specifications of the American Asso-

(Testimony of Homer M. Schauer.)

ciation of State Highway Officials. The flash points shown are 7 of the 15 are 90 degrees and the balance at either 95 or 100 degrees. We use the A.A.S.H.O. specifications because we consider this material in the category of road asphalt. Those specifications call for tests at intervals of 5 degrees, and a material's true flash point may be somewhere in between.

Redirect Examination (T1356)

The pumps on the stills will not run backwards, which means that once a product is pumped into a tank, it has to stay there.

There is no necessity for again testing the material once it has been put in a storage drum as we consider that that product meets specifications and nothing further could happen to it.

The amount of material in our cutback naphtha with a boiling point of 120 degrees, such as that reflected by the red curve in Plaintiff's Exhibit 27, would be a few drops in 100 barrels or less than a tenth of 1 per cent. (T1358) The material indicated by that red curve would probably contain materials that boil below zero degrees Fahrenheit, possibly one-tenth of 1 per cent. By carrying the test procedure down to a fine point, you can get minute amounts of various very light ends.

The product of the second still probably has an [254] octane rating of 40, whereas our motor fuels will be up around 80 or 90. By adding tetraethyl lead, you could increase it to maybe a 50 octane,

(Testimony of Homer M. Schauer.)

which is still very much below motor fuel, and I wouldn't classify it as a gasoline.

In order for the vapors coming off a material with a flash point of 80 degrees to flash when the material reached that temperature, the match would have to be held within about an eighth of an inch above the material; it would not flash an inch away.

At our refinery we have two crude running batteries of six stills each which are in operation most of the year. There are many other old stills that are not in shape to run crude any more and we use them for other purposes now.

The product of the second still is heavier in weight than gasoline.

Propane is used in refining for separating asphalt from the rest of the crude. When propane is added, you get a flocculation, precipitation or curdling, which would tend to make it more viscous. Propane itself is not found in ordinary service station gasoline, but the butanes and pentanes are and they have the same properties. If a cask of the primer was down to the bottom and ordinary service station gasoline were poured in, it might cause a jelling or a thickening of the material. [255]

Recross Examination (T1365)

The product of the second still is heavier than a motor gasoline and aviation gasoline. Its specific gravity is close to the range of gasoline and it is used to make gasoline.

(Testimony of Homer M. Schauer.)

Redirect Examination (T1367)

A winter grade of gasoline contains more of the lighter elements, such as butane and propane, than the summer grade of gasoline.

Recross Examination (T1367)

We don't measure flash points in gasoline, but they may be as low as minus 40 in our winter grade of gasoline, and the summer gasoline may have a flash point above zero.

(The noon recess was taken.)

2 o'clock p.m., Wednesday, May 5, 1954

HOWARD B. HOPPS, JR.

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1369)

My name is Howard B. Hopps, Jr.; I reside in [256] Oklahoma City, and I am a chemical engineer. I was graduated from the University of Oklahoma in 1945 with a bachelor of science degree, and am presently employed by Kerr-McGee Oil Industries, who are engaged in very general practices in the oil industry, including drilling, production, refining and geological work. My principal activity is as a technical advisor to our Oklahoma City office, which involves checking specifications and our ability to meet those specifications, and

(Testimony of Howard B. Hopps, Jr.)

then taking subsequent action as to producing the products.

The Kerr-McGee company owns one refinery in Oklahoma whose principal activity is the manufacture of asphalt, and we are among the first 15 companies in the United States on the amount of this product produced and shipped. We supply roof coating base stock or primer to the Panther Company, but not that which is shipped to the Pacific Northwest. We also supply a number of other companies with cutback asphalts, as well as manufacturing for our own direct sales.

I am familiar with the practices followed in the petroleum industry in placing warning labels on packages containing petroleum products packaged for use by the ultimate consumer. The practice in every instance I know of is to follow the I.C.C. regulations, since that is the only regulation we know of. [257]

Actually, we don't produce any asphaltic material having a flash point below 80 degrees, so we don't place any warning labels. As long as the flash point of an asphaltic material is above 80 degrees, we do not label with a warning label, nor do any of the companies for whom we package or any other company that I know of.

Cross Examination (T1375)

We follow the I.C.C. regulations because that is the only regulation we know of. I am not familiar with what the penalties are for violation of these

(Testimony of Howard B. Hopps, Jr.)

regulations, but I presume there are fines. That is one of the reasons we follow them.

For five and a half years I was chief chemist at our Winwood, Oklahoma refinery, during which time we set up our canning plant. That is where we can the roofing products for the ultimate consumer, and I was very closely associated with all the work and the getting up of the form for our labels, so I know what goes on those labels. Not being in the business very long before that, we followed what other manufacturers did to a large extent.

I don't know for sure whether the companies to whom we supply asphaltic material affix a warning label after its receipt by them. I have seen those same products in the store for sale.

I have heard of Johns-Manville Company, but I would [258] have to see some figures before I would agree it is one of the largest retailers of asphaltic materials in the United States. It is a lot larger than most of the companies whom we supply. I have never seen any of their roofing primer packaged and don't know whether it carries a warning label or not.

I have never heard of the W. P. Fuller Company or the American Tar Company.

Redirect Examination (T1379)

I have seen the products packaged by our company on the merchant's shelf and, as far as I can

(Testimony of Howard B. Hopps, Jr.)

tell, the labels are the same as when they leave our plant.

Recross Examination (T1380)

At any time in my connection with this business, I have never known or heard of any manufacturer labeling any of these roof primers with warning labels where the flash points are above 80 degrees Fahrenheit.

GEORGE I. BILLINGSLEY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1380)

I am George I. Billingsley and I am chief accounting officer, Panther Oil & Grease Company, as well as Secretary of the company. The records of the company are under [259] my general supervision and have been since 1943.

Defendant's Exhibit 65 for identification is the record we keep on a yearly basis showing the volume of the different products by domestic sales, and shows the sales for the years ended October '51, '52 and '53. The first column of the exhibit shows the gallons, the third item on each page is the primer, and the last column shows the money received for that number of gallons sold during the year. Prior to November of 1950, we have records which indicate the sales but not the number of gallons, that is, the dollar volume.

Defendant's Exhibit 65 admitted. (T1384)

(Testimony of George I. Billingsley.)

(Defense counsel read the following from Exhibit 65: November, 1950 through October, 1951, domestic sales of Battleship Primer were 377,060 gallons; the following year, 458,292; and the last year, 333,152.) (T1384)

Defendant's Exhibit 66 for identification is the same information for the export department, recapping the various products in the same manner as the domestic and for the same years.

Defendant's Exhibit 66 admitted. (T1385)

(Defense counsel read the following from Exhibit 66: November, 1950 through October, 1951, export sales of primer were 41,740; the following year, 47,067; and the last [260] year, 39,680.) (T1385)

Defendant's Exhibit 67 for identification is a tabulation showing the total sales by years from 1935 through the fiscal year 10-31-53 by dollar volume. We determined the amount of primer involved by taking the three years that we knew the gallonage and obtained a ratio of that to total sales, which was around 14 per cent, and we applied that percentage as an estimated primer sales for each of the years we didn't have the records. The 14 per cent was applied to sales of roof coating.

Defendant's Exhibit 67 admitted. (T1387)

The total gallonage involved for this period was 4,152,941, based on this method of computation.

As head of the department, any protests or com-

(Testimony of George I. Billingsley.)

plaints or refusal to pay for the product are directed to my attention.

(Objection was made to the question: "I will ask you if during the time that you have been associated with Panther Company, you have ever had any claim made against you for any loss or damage by fire from the use of your primer?" on the grounds of incompetency, irrelevancy and immateriality. In the absence of the jury, defendant argued to the Court that evidence of no similar occurrence would be admissible on the matter of proving notice to defendant and as proof the product was not inherently dangerous. Plaintiff [261] contended that if, as plaintiff claimed, the product were inherently dangerous, notwithstanding which there had been no previous fires or explosions, the introduction of such evidence would have the effect of meaning the manufacturer was then given an immunity under the law. The Court ruled that lack of prior complaints would not constitute a complete defense, but that it was evidence material to some of the issues.) (T1388-1394)

(In the presence of the jury, the question was read to the witness, to which he replied "No.") (T1394)

During the same period of time, to my knowledge, there has never been any claim made to the company that the primer was so viscous that it could not be applied by brush for roofing. Likewise, during all this period, our practice of labeling has been substantially the same as that testified to during

(Testimony of George I. Billingsley.)

the trial, and no claim has been made for any loss by fire.

(In a conference before the bench between Court and counsel, plaintiff indicated he proposed to ask the witness whether claim had been made to any company which indemnified the Panther Company; defendant objected as being improper; and the Court ruled such inquiry was objectionable, but that plaintiff might inquire whether claims had been made on account of their products directly or indirectly.) (T1395-1396) [262]

Cross Examination

(T1396)

I know of no claim which has ever been made against the Panther Company having to do with fire caused by this primer, and, to my knowledge, no claim has ever been made to anybody that might be related to my company in some way. There are four subsidiary companies and, if it was a very small matter, they wouldn't call it to our attention. An item of this importance I would know about. I would only hear about the important matters.

I would say that Plaintiff's Exhibit 17 for identification is the original invoice that was sent to Mr. Segerstrom by the Panther Company.

Plaintiff's Exhibit 17 admitted. (T1398)

ROBERT SLOAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

(T1399)

I am Robert Sloan; I reside in Denver, Colorado, which has been my permanent residence for three and a half years.

I received a degree of petroleum refining engineer from the Colorado School of Mines in 1949, and in 1951 I received a degree of master of science, petroleum refining engineer, also from the same school. I am married and am employed by the Motor Royal Oil Company, which I am used to [263] calling the Royal Oil Company and which is the plant that has been referred to as the one that receives the shipments from the Casper refinery, and the plant from which the primer in controversy was actually shipped to the Riverside Warehouse and from them to Mr. Segerstrom.

I was in charge of that company during the period in question and my position is that of chief chemist and plant superintendent. I work under the supervision of Mr. Ralph Uhrmacher of Panther Oil & Grease so far as matters of chemistry are concerned, and have been under his supervision since May of 1951.

On an average, we will employ from 11 to 15 people at the Denver plant, and I am in charge of all production work.

Defendant's Exhibit 68 for identification is an

(Testimony of Robert Sloan.)

exhibit which I prepared showing tests of flash point by the Tag. open cup flash apparatus of the CK87 primer which we receive from Casper, Wyoming and ship as Battleship Primer. I conducted these tests myself and followed the A.S.T.M. procedure for Tag. open cup tests.

Defendant's Exhibit 68 admitted. (T1403)

Exhibit 68 is a very enlarged chart. Six inches on this drawing illustrate one inch on the actual apparatus. What we are illustrating is, while the material may flash at a relatively low temperature under the actual conditions of [264] the flash test, as you bring the source of ignition at distances away from the cup, the temperature to which the material is heated will have to be greatly increased in order to produce a flash.

The A.S.T.M. standard for Tag. open cup test requires the flame to be $7/32$ nds of an inch above the level of the material being tested, or about a quarter of an inch. My first test of flash point was with the flame at that point.

When the material flashes, it is the ignition of the flammable vapor, there is no burning of the material in the cup, and it goes out immediately after the flash.

The material which I used on these tests was a typical sample of the primer involved in this controversy, but not a sample from the barrel shipped to Mr. Segerstrom.

With the ignition flame $7/32$ nds of an inch off the top of the material, I received a flash point of

(Testimony of Robert Sloan.)

94 degrees Fahrenheit. That means the material itself was at 94 degrees and has nothing to do with the room temperature. I then raised the ignition flame a half inch above the surface of the sample and received a flash point of 106 degrees; at three-quarters of an inch, I received 132 degrees; at an inch, 142 degrees. I then raised it to an inch and a half and got 150 degrees; two inches, 168 degrees; and at three inches I ran out of the range of my heating bath. The [265] highest temperature I got was 186 degrees and no flash occurred at that temperature with the flame three inches away from the material.

I not only ran the flames straight above the sample, I ran them on a 45 degree angle out from the test position and on a line level with the top edge of the cup, straight out from the cup. As I went up on the 45 degree angle at half an inch out or approximately just over the edge of the cup, I got 114 degrees before it flashed; one inch out, 146 degrees; an inch and a half out, 172 degrees; and two and a half inches out it would not flash at 186 degrees.

At right angles from the lip of the cup and right at the edge of the cup, the temperature of the sample was 96 degrees before the liquid flashed; a quarter of an inch out from the edge of the cup, 98 degrees; half an inch out, 146 degrees; and at one inch out it would not flash at 186 degrees.

CK87 is the asphaltic material which Standard Oil Company manufacturers to the Panther speci-

(Testimony of Robert Sloan.)

flection and supplies to us as primer. CK87 comes into our plant, is put into storage, is barreled and shipped without change. In manufacturing liquid asbestos roof coating, we take this same base primer, the CK87, and add to it asbestos and certain inorganic fillers, while the Battleship plastic cement is made in much the same manner only an additional amount [266] of asbestos and this inorganic filler is added to thicken it up. In each instance, CK87 is always the base.

Defendant's Exhibit 69 for identification is composed of the analyses reports which Standard Oil sends to the Royal Oil Company covering each shipment of asphalt CK87.

The CK87 is shipped to us in bulk in truck transports. Gasoline is never hauled in the same transports as it would be impossible to use the same equipment without an enormous amount of cleaning.

Voir Dire Examination
(T1412)

Defendant's Exhibit 69 for identification shows the tests of the previous results on the batches and the viscosity that was taken on the tank truck.

Defendant's Exhibit 69 admitted. (T1413)

When we first contracted with Standard Oil Company, which I believe was either August of '51 or August of '52, to supply us the base roof coating stock, we examined every shipment with a complete test. After a length of time, we satisfied ourselves

(Testimony of Robert Sloan.)

that Standard's tests were accurate in all respects. Since that time, we have been making what we call spot checks on the primer. About every fourth or fifth load in, we will pick out one specification or two listed on their specification sheet and run that analysis in our own [267] laboratory. In all the time we have been doing business with Standard, I have never found a discrepancy in their tests.

Every three or four months, I will send to Mr. Uhrmacher at Forth Worth a quart sample of the primer and he will check this sample against his samples and the samples from our affiliate companies. He has never told me there was any discrepancy between the tests made by Panther and my tests or those of Standard Oil.

The sheets contained in Exhibit 69 are sent to us by mail. We also receive records that come with each truckload of the material.

Among other things, Defendant's Exhibit 70 for identification, contains a receiving ticket indicating the material was received at our plant. Then there is a weight ticket which Standard gives us to determine the amount of gallons in each transport, which is usually 4,500 gallons. Then there is what might be called a bill of lading which Standard makes up on each shipment and upon which is written the results of tests which must be completed before that truck can leave the actual physical grounds of the refinery. These tests reflect the viscosity, the specific gravity, the net gallons at 60 degrees Fahrenheit, the net weight of the ship-

(Testimony of Robert Sloan.)

ment, the tests for moisture, and it also shows the number of the tank from which the CK87 was drawn and the [268] temperature at which it was loaded.

This product is usually loaded at from 150 to 200 degrees, and it loses about 10 degrees between Casper and Denver.

Finally, Exhibit 70 contains a bill of lading from the R. B. Wilson Trucking Company, with whom we have contracted to haul the material for us, and this is a combined tank shipping notice and loading report. It is actually a confirmation of the order which Standard Oil sends to us.

Defendant's Exhibit 70 admitted. (T1420)

If a truckload of this material arrives at our plant in the daytime, one person whom I have designated to take care of the unloading will go out and hook the truck up with an unloading pipe which will transfer the CK87 into one of our storage tanks by means of a pump through a valve network. If the material arrives at night, the unloading hose is made available to the truck driver. The outside unloading valve is locked, the switch on the pump is locked. The driver has been previously instructed as to how to operate the system, so he will hook this unloading hose up to his trailer, unlock and open the unloading valve, and then with a key turn on the pump which will unload it into a tank.

The tank into which the material is unloaded is called an outside storage tank, which is heated by

(Testimony of Robert Sloan.)

steam coils having a temperature of around 219 degrees. [269]

From the outside storage tank, the CK87 is pumped into our manufacturing plant into what we call an inside storage or barreling tank having a capacity of 550 gallons. It will then be drawn out of this tank by gravity flow into whatever size container we are filling at that time for ultimate delivery to the consumer. The most usual packages are 5-gallon pails, 30-gallon drums and 55-gallon drums.

In manufacturing the asbestos roof coating, we have two roof coating mixers alongside our primer barreling tank consisting of a 1000-gallon tank with paddle agitation. The primer is piped past the primer barreling tank into one of these asbestos roof coating mixing tanks, and the asbestos and fillers are incorporated into it. The same procedure is followed in manufacturing the cement, except the equipment is a little different because the cement is more viscous.

The CK87 is maintained at a temperature of about 160 degrees during the three processings described, as we try to keep the material warm enough for economical handling. It is very difficult to mix the ingredients at lower temperatures.

We have one 55-gallon drum of gasoline at our plant, which is kept locked so that it won't get into something inadvertently and so that the boys won't use it to clean floors and things of that nature. It would be absolutely impossible [270] for any form

(Testimony of Robert Sloan.)

of gasoline to be mixed with the CK87, either en route in the trucks or during processing.

In addition to the Panther Company, we also deliver CK87 to the American Lubricants Company, Dayton, Ohio; the Panther Oil & Grease Manufacturing Company of Canada at Moose Jaw, and occasionally to another company, and we also package for ourselves, the Royal Oil Company. In each case, we attach to the container the label furnished by the respective companies, which is the only label that goes on the drum.

We package aluminum paints having a flash point below 80 degrees Fahrenheit which we label with the I.C.C specified red label indicating it is flammable.

The consignee of Battleship products in the Pacific Northwest is Riverside Warehouse Company in Spokane. They, in turn, deliver the products to Idaho, Washington and Oregon. In shipping to the Riverside Warehouse from our Denver plant, the oldest material is always shipped out first.

I have records of these shipments to Riverside Warehouse covering the period from September, 1952 through March, 1953.

(The shipping data was then given by the witness.) (T1427-1429)

(By agreement, Howard B. Hopps, Jr. recalled.)

HOWARD B. HOPPS, JR.

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued) (T1430)

I am quite familiar with the packaging operations at my company, Kerr-McGee. We package for various concerns and ship the material out to distributors. We package these petroleum products in everything from pint cans up to 55-gallon drums. We do not package any material with a flash point below 80 degrees as we have no call for anything of that nature. Primer is the material we handle with the lowest flash point. We do not package gasoline or anything similar to gasoline, and I don't believe I have been around plants where materials were packaged with flash points below 80 degrees Fahrenheit.

ROBERT SLOAN

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination

(T1433)

The aluminum paint which we package at the Motor Royal Company has a flash point which just splits 80 degrees. Sometimes it is below, sometimes it is above. It is packaged in 5-gallon cans only and is shipped by railroad and motor carriers. The 5-gallon containers are not placed [272] in boxes for shipment, but are banded into the cars so they won't shift or move. I am not aware that when

(Testimony of Robert Sloan.)

small containers are placed in a box for shipment that the I.C.C. regulations only require a warning label on the outside carton.

I don't know that the stock of the Royal Oil Company is held by the stockholders of the Panther Company. I own 50 shares. I testified that Panther bought Motor Royal in May or June of 1951. Subsequent to that time, I am not sure of this but I believe the stock of Motor Royal was sold back to Motor Royal.

I don't know that the American Lubricants Company is wholly owned by the Panther Company and have never heard that it was in so many words.

The cutback asphalt ordinarily comes from the refinery in tank trucks and is unloaded by hose. The hose is grounded to prevent the accidental discharge of static electricity which will form a spark.

We package the primer and aluminum paint in the same building, which building has "No Smoking" signs and vapor-proof lights.

The Tag. open cup used in making the tests shown in Exhibit 68 is about two inches in diameter and two and a quarter or two and a half inches deep. The sample cup is filled with the material and then a leveling device is swept [273] over the top of the cup until it is just touched by the fluid being tested. The leveling device rides on the top of the cup and has a protrusion of about an eighth of an inch down from the lip so that the level of the liquid is an eighth of an inch down from the

(Testimony of Robert Sloan.)

level of the lip of the cup. The cup will then contain one, maybe two ounces. The tests were made in our laboratory in Denver under a draftless hood.

Under normal conditions, the vapors from this material are heavier than air. The vapors will not come over the lip of this cup and down to the base of the floor in a draftless condition, because of the heat convection currents coming up around the sides of the cup, the hot air is rising and carrying the vapors with it. If there were no heat directly under the cup, the normal tendency of these vapors would be to go down to the floor.

The cup is immersed in a water bath with a burner below the water bath. There is a uniform heat coming up alongside the cup from the water bath, which would cause enough convection so that the vapors wouldn't come down to the floor. Because of the manner in which this equipment is designed, the vapor would not get beyond the range of the convection.

Exhibit 68 indicates that right at the edge of the cup the flash point was 96 degrees, and a quarter of an inch out beyond the edge of the cup it was 98 degrees. It do not [274] believe that indicates the vapors are spilling over the edge. The exhibit indicates you have to go up approximately an inch to the lip of the cup from the surface of the liquid and then over a further two and a quarter inches to reach the point where 98 degrees is shown, or the same distance for the vapor to travel as the point where the 106 degree reading was obtained;

(Testimony of Robert Sloan.)

but have you ever seen a substance of this type vaporize, like a pan of boiling water? It does not prove that the vapors are spilling over the edge of the cup.

I believe in a draftless atmosphere there would be enough material in the cup to form a considerable amount of vapor. I believe comparable findings would be had if there were a washtub of the material in this room. A 55-gallon washtub of this material sitting in this room at a temperature of 100 degrees for about four hours would give off a pint of vapors. A pint of vapors in liquid form would make approximately 300 cubic feet of an explosive mixture. I don't believe it would make 300 cubic feet of the vapors. I can't quote the formula directly, nor do I have a book with me from which I could determine it.

I had never heard of the National Fire Protection Association's Hand book of Fire Protection until you mentioned it yesterday. I never heard the formula expressed as: "The cubic feet of vapor evaporation of one gallon of solvent [275] equals 8.33 times the specific gravity over .075 times the vapors density." That is not taught in the normal physical chemistry courses.

The explosive mixture would be in the area of about 2 per cent mixture with air, which would mean that in this 300 cubic feet of explosive mixture, there is only 6 cubic feet of vapors. At 140 degrees Fahrenheit, you would only create 6 cubic feet of vapors from a 55-gallon drum of this mate-

(Testimony of Robert Sloan.)

rial. I base that on the result of experimentation. I don't know how much vapor would be obtained if the material were allowed to stand for four hours as I have not run experiments on that. My test was over a period of half an hour. I raised the temperature 2 degrees a minute up to 140 degrees and calculated the amount of vapors by the difference in weight of the sample before and after heating, which amounted to approximately a pint of naphtha from the primer, or the equivalent of a pint from 50 gallons. So long as the tub is sitting open, it is giving off vapors, the same as this glass of water is giving off vapors.

At our plant we always ship out the oldest material first, but I don't know anything about what the Riverside Warehouse does.

We make tests of about every fourth shipment received from Standard Oil. The asphalt is blown by Standard and nothing is added to it. The asphalt is then cut back [276] with solvent and shipped to us. The only difference between the primer and the roof coating is that in the latter we add asbestos and inorganic mineral dusts which tend to cement the product. The primer is not manufactured under a patent, other than it is manufactured to the Panther's specifications.

We check Standard's testing on about every fourth shipment by testing the specific gravity, the viscosity, the flash point, and running a distillation test, but we do not necessarily make all these tests on each fourth shipment. We check distilla-

(Testimony of Robert Sloan.)

tion about every other test to see what type of solvent is being used, if it is a solvent conforming to our specifications. If too much were in the low boiling range, we would know that too light a solvent had been used. Our first check point is 374 degrees, and then we check at 437, 500 and 680 degrees to see that we are getting approximately the correct amounts at each of those temperatures, which is all we do with the solvent portion. Then we check the softening point and penetration and ductility.

If there were any light ends in this solvent, the initial boiling range would be too high. If we got something over specifications off at 374 degrees, it would depend on how the rest of the distillation looked as to whether it was due to the presence of light ends.

The specifications permit a 7 per cent variation [277] in the amount of material distilled over at the various given temperatures. If 30 per cent were obtained on the first bracket and then 32 per cent off at 500 degrees, that would tend to indicate a great deal of light ends. If you got a relatively large percentage off at the first check point and then relatively less off at the succeeding higher bracket, still within specifications, that would tend to indicate light ends. If we were running a distillation as a spot check on this and something peculiar like that happened, then we would follow it up with the complete examination, corollating this result to other results, which would indicate

(Testimony of Robert Sloan.)

whether there were light ends in it or some other possibility.

In running the distillation tests, we are not checking specifically for light ends. In refinery practice there would not be light ends present in the material. We are checking the material because we are selling a quality product to a customer and we want to make sure he is getting what he is paying for. We don't necessarily run the distillation test every fourth time.

We have run tests on the solvent portion after distillation to see what its boiling point was. I believe I misled you when I testified if anything would develop from the distillation test indicating something was wrong with the solvent, we would check the solvent. If something should [278] show up in the distillation that would indicate something other than normal, we will completely check the sample to see where the trouble is. The trouble might be in the asphalt portion or it might be in the solvent. There doesn't have to be something wrong with the distillation test for us to run a test on the solvent portion. I have never found anything in my testing that was in contradiction to something on Standard's report sheets.

If a naphtha with a flash point of 50 degrees had been used in the tests shown in Exhibit 68 instead of the primer, the flash temperature of the naphtha would be much lower than that indicated at the 186 degree level. I don't believe it would be over 100 degrees, but I have never tried it. It would not

(Testimony of Robert Sloan.)

elevate in the same proportion that is shown on Exhibit 68. I have tested gasolines and naphthas, though not in that manner, and I believe I know something of their characteristics.

It is true that if there were gasoline sitting around in tubs in this courtroom and permitted to stand over a period of time, that this whole courtroom would blow up providing there was a spark or flame to ignite it.

The only means of checking the batch out of which the material received by Mr. Segerstrom was shipped is that we have the range of carloads which this material did come out of. I don't know how long Riverside Warehouse held it, [279] only that in order for us to get an order for merchandise to be shipped to them, the stock must be relatively depleted in the warehouse.

Redirect Examination (T1466)

When we first began to deal with Standard, we checked their analysis sheets against actual physical tests which were run in our laboratory and found that they were consistently correct. Since that time, we have made tests from time to time to see that they continue to be accurate, including tests to determine the presence of light ends, and have found none present.

Recross Examination (T1467)

We have run tests from time to time on the solvent itself as to its boiling point.

* * * * *

(Whereupon, a witness was called by defendant who testified to matters relating to damage aspects of the case (T1468). Objection was made to admission of certain of his testimony (T1470), the jury was excused, and a discussion was had between Court and counsel on the legal question involved (T1471-1485). A ruling was deferred, and the cause was adjourned until 10 o'clock a.m., Thursday, May 6, 1954.) [280]

10 o'clock a.m., Thursday Morning, May 6, 1954

(Out of the presence of the jury, further discussion was had between Court and counsel dealing with damage features of the instant cause (T1486-1504). During the course of this discussion, plaintiff advised the Court a requested instruction was being submitted which would advise the jury that the I.C.C regulations had nothing to do with the obligations, if any, of the defendant to the plaintiff as to use of warning labels; that they were enacted solely to govern the transportation of dangerous articles. Defendant urged that several of its witnesses had testified the said regulations provided the only measure or standard of safety known in the industry. The Court stated he did not think the regulations set up the standard of care so far as the relationship between manufacturers and consumers was concerned, but that the evidence relating to them was properly before the jury for certain purposes, and that an instruction would be framed and given accordingly.) (T1504-1511)

JOSEPH C. GILMORE

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination (T1512)

My name is Joseph C. Gilmore; I have lived in [281] Spokane for 10 years this last time; I am 50 years old and am employed by the Riverside Warehouse Company as Superintendent and have been for 6 years.

My duties consist of caring for the merchandise, supervising its unloading when it comes in, and shipping it out on order. Except in cases where merchandise is ordered out of cars by the shipper, we put the old merchandise to the front and always put the new merchandise in the back.

I am familiar with Battleship products manufactured by the Panther Company, and they have been stored in our warehouse during the entire 6 years I have been there. When a new shipment of merchandise comes in, we check our older stock to get a double check on the amount on hand and move it out on to the warehouse floor. We then put the new merchandise in and that is checked in and we put the old merchandise in front of it and it is shipped out first.

Cross Examination (T1515)

Orders for shipment of Battleship products from the warehouse come from the Panther Company. At the beginning of every month there is a physical count made of the warehouse stock which is sent to the Panther Company.

(Testimony of Joseph C. Gilmore.)

I do not move the barrels myself, but supervise the work of the 6 men who do so. [282]

(The witness on damage testimony withdrawn in favor of Mr. Gilmore resumed the stand and testified further.) (T1516-1540)

(Defendant's Exhibits 72 and 73 for identification, being regulations of the Washington State Department of Labor and Industries and an amendment thereto, were offered in evidence with the explanation they were not being offered as evidence of negligence per se but were admissible as evidence of negligence, numerous authorities being cited. Plaintiff argued the regulations had no application to other than those named in the act. The Court ruled the offer was not timely made; that the effect of the admission of the exhibits or submission of an instruction embodying the regulations would be tantamount to instructing the jury a violation of them would be negligence per se; and that the regulations had no application to the plaintiff and his employees, and the exhibits were rejected.) (T1540-1559)

(The noon recess was taken.)

2 o'clock p.m., Thursday Afternoon, May 6, 1954

(Defendant advised the Court the regulations contained in Defendant's Exhibits 72 and 73 had only been brought to its attention on either the 16th or 19th of April, 1954.) (T1560-1561)

Defendant rests. (T1561) [283]

Rebuttal

(John Norman Segerstrom, plaintiff herein, was recalled in rebuttal and testified to matters relating to damages.) (T1561-1582)

RHEA ROSENBAUM

recalled as a witness in rebuttal, having previously been sworn, testified further as follows:

Direct Examination

(T1582)

Pursuant to request, I took a sample yesterday from the barrel of primer at my place which has been marked Plaintiff's Exhibit 76 for identification. This sample was taken from the same barrel that has been discussed for several days in this case and from which other samples were taken.

(Objection was made to the question: "And how does it compare in thickness as of yesterday with its thickness at the time you first opened the barrel back on July 7, 1953 for the purpose of starting to apply it to your roof?" on the ground of its being improper rebuttal; overruled.) (T1583-1584)

I think it is about the same probably as it was July 6th, the first day I opened the barrel, before it was taken out in the sun.

(Objection was made to admission of Plaintiff's [284] Exhibit 76 for identification as not proper rebuttal; overruled.) (T1585)

Plaintiff's Exhibit 76 admitted. (T1585)

J. M. KNISELEY

having previously been sworn, recalled in rebuttal, and testified as follows:

Direct Examination

(T1586)

Pursuant to request, Dean McGivern of Gonzaga University and I went out on the market in Spokane yesterday and acquired various types of asphalt roof coating.

Voir Dire Examination

(T1587)

I did not obtain the specifications of the manufacturers of the brands of asphalts secured. We ran tests on the materials last evening and I have my pencilled notations relating to the tests.

(Objection was made by defendant that the evidence being offered was not proper rebuttal; overruled, with a continuing objection to the line of testimony being allowed.) (T1587-1588)

Plaintiff's Exhibit 77 for identification is one of the brands of asphalt roof coating which I purchased yesterday and on which I ran a flash test last evening. The product generally appears to be the same type of material as Battleship Primer.

(Upon further objection, the jury was excused, and defendant argued that the manufacturer's specifications would be the only proper evidence; that a single can of a product would not be proper proof of the point sought to be established nor proper impeachment of defendant's witnesses. The Court

(Testimony of J. M. Kniseley.)

ruled the offer had probative value and the objection was overruled.) (T1589-1593)

The flash point of the material contained in Exhibit 77 for identification was 116 degrees Fahrenheit.

Plaintiff's Exhibit 77 admitted. (T1594)

(Plaintiff stated to the jury that Exhibit 77 was Johns-Manville Regal Roof Coating; "Handling Instructions: Keep away from open fires.") (T1594)

Plaintiff's Exhibit 78 for identification is one of the materials I purchased yesterday and a flash test was also run on it. The material in this exhibit contained some fibers, but otherwise it was a cut-back asphalt. Its flash point was 136 degrees Fahrenheit. I think we got this can at Fuller's.

Plaintiff's Exhibit 78 admitted. (T1595)

(Plaintiff stated to the jury that the label on Exhibit 78 contained the following: "Pioneer-Flintkote Asbestos Roofing Coat"; that under directions for use in small letters appeared: "If it is too heavy, thin slightly with [286] naphtha, gasoline or kerosene"; in capital letters: "Do Not Heat Over Direct Fire.") (T1595)

Plaintiff's Exhibit 79 for identification is one of the products I purchased yesterday at Mansur Supply and on which I ran a flash test and obtained a flash point of 85 degrees Fahrenheit. It is similar to Battleship primer.

Plaintiff's Exhibit 79 admitted. (T1596)

(Plaintiff stated to the jury that Exhibit 79 was Celotex Asphalt Roof Coating manufactured by the

(Testimony of J. M. Kniseley.)

Celotex Corporation; that under directions in capital letters appeared: "Caution: Do Not Heat Near Fire.") (T1597)

These flash tests were run at Gonzaga University in collaboration with Mr. McGivern.

Plaintiff's Exhibit 80 for identification is one of the products I purchased yesterday and on which I ran a flash test and obtained a flash point of 130 degrees Fahrenheit. It is very similar to Battle-ship primer.

Plaintiff's Exhibit 80 admitted. (T1598)

(Plaintiff stated to the jury that Exhibit 80 had a label affixed thereto containing the following "Dri-N-Tite, The Modern Method of Roof Resurfacing, Primer Black. Caution: Keep Away from Open Flame and Use in a Well-Ventilated Place.") (T1598) [287]

Cross Examination (T1598)

The substance of each cautionary instruction in Exhibits 77 through 80 is not to heat over an open flame, which is essentially the same phraseology as contained in the instruction book, Defendant's Exhibit 18.

JAMES G. McGIVERN

having previously been sworn, recalled in rebuttal, and testified further as follows:

Direct Examination (T1600)

I accompanied Mr. Kniseley yesterday in purchasing the asphalt products.

(Testimony of James G. McGivern.)

(The defendant was allowed a continuing objection to the line of testimony.) (T1600-1601)

I also worked with Mr. Kniseley last evening in running flash tests on these materials contained in Exhibits 77 through 80, and the flash points obtained were as testified by him.

Plaintiff Rests. (T1601)

(A witness was called by the defendant in rebuttal on damage features of the instant cause.) (T1602-1606)

Defendant Rests. (T1606)

(Plaintiff's Exhibit 41 withdrawn.) (T1607)

The jury was excused until 1:30 o'clock p.m., Friday, May 7, 1954, and the defendant moved that Plaintiff's Exhibit 27 be withdrawn from the consideration of the jury and stricken from the record; that all testimony pertaining to Exhibit 27 and to the contamination or dilution of the primer involved by the addition or intermingling of light ends (aviation gasoline or winter gasoline) be also withdrawn from the consideration of the jury; on the ground the plaintiff had not sustained the burden of proof to overcome the presumption in law that the contamination occurred after the material left the control of the manufacturer where a course of manufacture had been proven.

The Court ruled the matter a factual issue to be determined by the trier of the facts and denied the motion. (T1609-1615)

The defendant moved the Court for a directed verdict in favor of the defendant as follows:

"All parties having rested, the defendant moves that the Court direct the jury to return a verdict for the defendant on the following grounds:

"1. That the plaintiff, under the law and the facts, is not entitled to damages in this case;

"2. That the plaintiff has failed to offer sufficient evidence of legal damage to his property;

"3. That no evidence of negligence has been established [289] in the way of negligence of the defendant, because:

(a) The defendant could not reasonably anticipate the action of the plaintiff resulting in a fire in his warehouse;

(b) The defendant could not reasonably anticipate the actions of the plaintiff's employees resulting in said fire;

(c) It is shown that the defendant followed the usual practice of persons engaged in the same industry so far as label warnings are concerned;

(d) That the asphalt roofing material is a well known, standard product and is not inherently dangerous; and

(e) That the defendant gave all necessary warning to not heat the material by way of instructions.

"4. The plaintiff was guilty of negligence which materially contributed to his injury, in that:

(a) He failed to read the instructions given to him;

(b) He failed to transmit those instructions to his employees charged with using the plaintiff's material; and

(c) That plaintiff failed to follow the [290] instructions given to him, but violated the same.

“5. That the plaintiff’s employees were negligent as a matter of law in building a fire under the primer furnished by the defendant, knowing that such action was dangerous and knowing that the same might cause fire under the circumstances;

“6. That if the plaintiff determined that defendant’s primer was too stiff to use, it was his duty to communicate with the manufacturer;

“7. That the plaintiff’s employees were negligent as a matter of law in building a fire under the primer when they learned that it had become thinner after sitting out of doors in the open air;

“8. That any danger in connection with the use of the material was created by the plaintiff himself using the same improperly and contrary to directions; and

“9. That if any substance other than shown in the formula, by accident or intention, got into the said primer, it happened during the time it was under the control of the plaintiff and after it left the control of the defendant.” (T1616-1618)

(The motion was denied.) (T1631)

Extensive argument was had upon the propriety of the giving of Plaintiff’s proposed instruction as follows: [291]

“You are instructed that there is a statute in the State of Washington (Revised Code of Washington 70.74.300) which provides as follows:

‘A person who puts up for sale, or who delivers to a warehouseman, dock, depot or common carrier, a

package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor.'

"You are instructed that a violation of the foregoing statute would constitute negligence. Therefore, if you should find from a preponderance of the evidence that the Primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant in such event would be guilty of negligence for failing to label the Primer in the manner required by that statute, and if you should further find from a preponderance of the evidence that the fire damage to plaintiff's property proximately resulted from such failure to label, if any, then your verdict should be for the plaintiff, unless you should further find from a preponderance of the evidence that plaintiff was guilty of negligence which proximately and materially contributed to the occurrence of such fire damage."

Ruling reserved. (T1618-1629) [292]

Further discussion was had regarding measure of damages, following which an adjournment was taken until 11:30 o'clock a.m., Friday, May 7, 1954. (T1629-1635)

11:50 a.m., Friday Morning, May 7, 1954

Out of the presence of the jury, defendant submitted an additional requested instruction pertaining to the regulations of the Washington State Department of Labor and Industries, the substance of which had been offered and rejected as Defendant's Exhibits 72 and 73. The Court refused to give the instruction. (T1636-1638)

The following proceedings were had dealing with plaintiff's requested instruction incorporating Revised Code of Washington 70.74.300 (quoted on preceding page):

"The Court: In regard to the statute which the plaintiff has requested an instruction on—it is Section 259, Page 967, of the Laws of Washington, 1909, Chapter 249—I have given that considerable thought and attention and I see no way that I can avoid giving an instruction on that. I put it in that way because it seems peculiar to me that the statute hasn't been enforced, that it should be applicable in a case of this kind, but, of course, it is neither my duty nor my function nor in my power to try to wipe from [293] the statute books of the state what I regard as perhaps obsolete statutes that should be repealed.

"I can find no express repeal or repeal by implication of this statute, and certainly people far more expert than I am in that field have taken the same view of it because it has been included in two codifications—three, I believe it is—the Remington Revised Statutes and another later Remington's

Code and the present R.C.W.—and it does by its terms apply to this situation.

“And so far as the matter of the Federal Government having pre-empted the field by its legislation giving the Interstate Commerce Commission the power and authority to fix standards for the transportation of inflammables and dangerous explosive materials, I don’t see how you can say they pre-empted the field because the fields are wholly different. The Federal statute applies to interstate commerce and interstate commerce only, and if we assume that this is a transportation statute, as only the bare title of Section 254 would indicate, it would be intrastate transportation, but if you read this statute, it isn’t even a transportation statute. It makes it unlawful for every person to put up for sale or deliver to a warehouseman, dock, depot, or common carrier, a package, cask or can containing the prohibited ingredients. So that all we have here, we don’t even have commerce, we have a prohibition [294] against putting up for sale and delivering to a carrier or to a dock, depot or warehouseman, and that could be done without in any way involving even intrastate commerce, so I can’t see how you could possibly say the field has been pre-empted.

“By its terms, it applies; it hasn’t been repealed expressly, I don’t believe by implication; and regardless of what I may think of the statute, I have no control over the matter, as I see it.

“Mr. Graves: May I make an observation in that connection, your Honor?

"The Court: Yes.

"Mr. Graves: We are also, of course, taking the position that that applies to the unadulterated benzine, gasoline or naphtha.

"The Court: I assumed so, too.

"Mr. Graves: And not just the small percentage of naphtha.

"The Court: No, but what have you to say as to 'or other explosive or combustible substance,' which I assume would mean of a like character?

"Mr. Graves: Well, I am not arguing with your Honor. I think, in that connection, that the definition of 'explosive' in the 1931 Laws must govern, and instead of instructing the jury that this is the law pertaining to [295] this—I don't know exactly what the instruction is, I don't have it in mind—at the most that could be done would be to define what an explosive is. I would feel that clearly we do not fall within the purview of the statute, because this is neither gasoline, benzine or naphtha. Then you can instruct the jury as to what is an explosive.

"The Court: Well, your explosive statute is a different statute for different purposes, for storage, and doesn't apply in its terms or by its context to this one, and the plain implication here is that they regard these substances as explosives for the purposes of these statutes, because they name them and then say 'or other explosive or inflammable substance.'

"Mr. Graves: The word 'combustible' is, of course, quite different from 'inflammable,' too.

“The Court: Well, obviously, the legislative intent is to regard these things as explosives for the purposes of these statutes or they wouldn’t say ‘other explosive,’ it seems to me, but that is the view I take of it, which others might very well regard as erroneous.” (T1638-1641)

The Court further advised counsel of the remainder of the instructions to be given to the jury. (T1641-1642)

The noon recess was taken. [296]

1:30 o’clock p.m., Friday Afternoon, May 7, 1954.

Out of the presence of the jury, there was a lengthy discussion between Court and counsel relating to Plaintiff’s Exhibit 27. On motion, the Court granted leave for defendant to withdraw motion previously made to strike Exhibit 27 from the record and all testimony pertaining thereto. (T1643-1653)

Oral argument was made to the jury, after which the following instructions were given by the Court:

INSTRUCTIONS TO THE JURY

(T1655-1679)

“Now, ladies and gentlemen of the jury, now that you have heard the testimony of the witnesses and the argument of counsel, it becomes my duty to instruct you upon the rules of law which you are to follow in arriving at your verdict in this case. It is your duty to decide the issues of fact presented, but you should take my instructions as a true and correct statement of the law involved.

“You should consider the instructions as a whole and not attach any special importance or emphasis to any particular part of them.

“Now, members of the jury, I wish it were possible for me to discuss informally, tell you in a few brief words, what the law is and the rules of law that you should follow in your deliberations in this case, but, unfortunately, lawsuits are just not that simple and the relationship of individuals and parties in cases of this kind is not that simple, and it is my duty to instruct you fully and correctly and as accurately as I can about the rules of law that you are to follow, and they are, in many instances, not simple and I am afraid will be difficult for you to understand. [298]

“I think it might be helpful, however, at the outset before I read these formal instructions to you to just explain this briefly. I think jurors must get the idea sometimes that a judge is giving inconsistent and even contradictory instructions, but we try not to do that and I think you will find that we are not doing it, if you consider that it is your sole function and responsibility to decide the facts. And where there is conflict in the facts and the evidence, as there always is in a difficult and hard-fought lawsuit such as this, where there is a conflict in the evidence, then it is for you to make the decision and decide which line of testimony or evidence you shall follow, so I must give you instructions that fit either finding. I must tell you what the law is if you find the facts one way and what the law is if you find the facts the other way, and you

will find that that is what I do in many of these instructions.

“I have to make the assumption that you may find the facts in favor of the plaintiff’s contentions; if so, the law that you should apply will be so and so. On the other hand, you may find the facts according to the contentions of the defendant, so I must also tell you what the law will be in case your finding is that way.

“Now in considering whether you should return a verdict for the plaintiff or for the defendant in this case, [299] I suggest that you first consider whether or not, under the evidence and the instructions which I shall give you, the defendant is responsible or liable for the loss by fire of the plaintiff’s property. If you should find that the defendant was not liable, then that would end your inquiry and your verdict should be for the defendant. If, however, you should find that the defendant is liable, then you should consider, in the light of the evidence and the Court’s instructions, what amount you should allow the plaintiff for his loss and damages.

“Now the attorneys for the parties here, the plaintiff and the defendant, have informed you quite fully, I think, that their claims, respective claims or contentions are, have done so in their opening statements and in their arguments, and I shall not attempt to restate them comprehensively or accurately, but for the purpose of convenience I will briefly summarize them, as follows:

“At the outset, the plaintiff claims and contends

that the defendant's Battleship roof primer was a highly inflammable, explosive and inherently dangerous product; that the defendant knew or should have known that it was inherently dangerous, and was negligent in that it did not properly and adequately warn the plaintiff of the dangerous nature of the product; that the defendant was further negligent in that the product could not be applied without [300] heating, which fact was known or should have been known to the defendant, and that the defendant further knew or should have known that heating would render the material extremely dangerous, subject to explosion of gases volatilized from the material, and that the destruction and loss of plaintiff's property and the damage which he claims proximately resulted from such negligence on the part of the defendant.

"The defendant denies that its product was inherently dangerous or that the defendant had any reason to know or believe that the product was dangerous, or that the defendant was in any respect or particular negligent or that any negligence on its part proximately resulted in any loss or damage to the plaintiff; and the defendant further affirmatively claims and contends that any loss or destruction of property and damages that the plaintiff suffered was the result of plaintiff's own contributory negligence in that the defendant gave plaintiff written instructions as to how to use Battleship and, if such instructions had been followed, no fire would have occurred; and that the employees of plaintiff exposed the primer in question to an open fire inside

a building, realizing that such action was dangerous; that the plaintiff assumed the risk and hazards involved and is responsible for his acts of negligence and cannot recover.

“The plaintiff on his part, by way of reply, denies [301] that he was guilty of any contributory negligence which proximately resulted in his loss or damage.

“Now the plaintiff has the burden of proving by a fair preponderance of the evidence his claims or contentions, both as to liability and as to damages; and the defendant on its part has the burden of proving by a fair preponderance of the evidence its affirmative claims and contentions that the plaintiff’s loss was due to his own negligence.

“The expression ‘fair preponderance of the evidence’ means the greater convincing force or weight of the evidence. It means that which appears to be the more reasonable or probable happening or event. It does not necessarily mean the greater number of witnesses testifying for or against a given proposition or claimed fact or series of facts, nor does it make any difference on which side the evidence is offered. It means, taking all the evidence on that issue into consideration, that the convincing weight and force of the evidence is in favor of one side against the other.

“The basis of this action is negligence. Negligence is the failure to exercise reasonable and ordinary care. By the term ‘reasonable and ordinary care’ is meant that degree of care which an ordinarily careful and prudent person would exercise under the

same or similar circumstances. [302] Negligence may consist of the doing of some act which a reasonably prudent person would not do or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is want of due care or ordinary care in the particular situation.

“‘Due care’ and ‘negligence’ are relative terms, and what in one situation might be due care might be negligence in another; so that the measure of duty is always reasonable care and caution under the particular circumstances presented.

“Before the defendant can be held liable in damages, you must find from a fair preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the plaintiff’s injuries and damages.

“Contributory negligence is negligence upon the part of the plaintiff which proximately contributes to his loss and damage, and the term ‘negligence’ in this connection has the same meaning as previously just defined by me.

“Contributory negligence is a complete defense, and if you find that the plaintiff was guilty of contributory negligence, as I have just defined it, then your verdict should be for the defendant.

“Now this term ‘proximate cause’ of an injury, as [303] I have used the term, means a cause which, in a natural and continuous sequence, unbroken by any new independent cause, produces the injury and without which the injury would not have oc-

curred and would not have been sustained. In this case, of course, when I say 'injury,' I mean injury to property, damage to the property by the fire.

"You are instructed that, aside from any requirements of a statute, a manufacturer who puts up and sells a material which, when made according to the manufacturer's formula, is inherently dangerous for the use for which it was supplied or a use to which the manufacturer has reason to expect it to be put, that the manufacturer has a positive duty to give adequate warning of its dangerous character to the purchaser of such material, and the failure of such manufacturer to give such adequate warning is negligence rendering the manufacturer liable for any damages proximately resulting from such failure to warn.

"You are further instructed that the manufacturer is charged with knowledge of the contents of containers put up by such manufacturer for sale to the public, when put up in accordance with the manufacturer's formula, and it is no defense for the manufacturer to say that he did not know of such dangerous nature of the contents.

"You are further instructed that where a corporation puts out a material under its own label and as having [304] been manufactured by such corporation, the corporation is liable as to such material as though it had actually manufactured the material, and it is no defense that the material has, in fact, been manufactured by another.

"You are therefore instructed that if you find from a preponderance of the evidence that the ma-

terial sold by the defendant to plaintiff was inherently dangerous, when made in accordance with the defendant's formula, for the use for which it was supplied or the use to which defendant had reason to believe it would be put, and that defendant failed to warn plaintiff adequately of such danger as to the material, and that the fire and damage to the plaintiff's property proximately resulted from such failure to warn adequately, if any, then your verdict should be for the plaintiff, unless you should further find from a preponderance of the evidence that plaintiff was guilty of contributory negligence which proximately and materially contributed to his damage, to the damage to his property.

"You are instructed that there is a statute in the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:

'A person who puts up for sale, or who delivers to a warehouseman, dock, depot, or common carrier, a package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon [305] in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor.'

"You are instructed that a violation of the foregoing statute would constitute negligence. Therefore, if you find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the fore-

going statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by the statute; and if you should further find from a preponderance of the evidence that the fire damage to plaintiff's property proximately resulted from such failure to label, if any, then your verdict should be for the plaintiff, unless you should further find from a preponderance of the evidence that plaintiff was guilty of contributory negligence proximately and materially contributing to the occurrence of such fire damage.

"Now in qualifying some of the other instructions, I will have occasion to refer to this statute and I will refer to it as the Washington statute, because it is the only one that I shall read to you, and that means, without my repeating it each time, that where I refer to this statute, if you find that this statute does apply and you decide [306] that the plaintiff should have a verdict under this statute and under this instruction, then the other instruction does not apply; but if you find that this is not applicable, that this instruction is not applicable with reference to the statute, then the other instruction I shall give you is to be applied with full force.

"There has been some reference to the regulations of the Interstate Commerce Commission during the evidence. You are instructed that the regulations of the Interstate Commerce Commission as to the labeling of flammable materials are concerned with the hazards connected with the shipment of such materials in interstate commerce, and you are

not to regard such regulations as fixing the standard of care which a manufacturer of an inherently dangerous, flammable material is required to exercise in selling and supplying such a material to a purchasing consumer for the latter's use. Compliance with such Interstate Commerce Commission regulations would not absolve a manufacturer from liability for damage sustained by a consumer, if the manufacturer would be liable under the evidence and the instructions which I have heretofore given you.

"The fact, if it be a fact, that the plaintiff or his employees knew the physical characteristics or composition of the primer in question is alone insufficient to charge them with contributory negligence. In order for [307] plaintiff or his employees to have been contributorily negligent, you must further find by a preponderance of the evidence that they appreciated the peril or danger involved in heating the primer as they were doing, or, in the exercise of due care, acting as reasonably prudent persons, they should have appreciated it. In this connection, the acts of the plaintiff and his employees should not be judged by the knowledge of experts on the subject, but rather should be judged in the light of the knowledge and experience common to unskilled, ordinarily prudent individuals.

"Where the law imposes a duty on a manufacturer to warn those to whom he is selling the product of its dangerous nature, if any, the warning must be made in such a way as to acquaint a person of reasonable intelligence with the danger in-

volved, and an insufficient warning, is, in legal effect, no warning.

“In determining whether or not defendant was guilty of negligence or plaintiff or his employees were guilty of contributory negligence, you are instructed that foresight, not retrospect, is the standard of diligence. It is nearly always easy after an accident has happened to see how it could have been avoided, but negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men, under the same circumstances, would or should in the exercise of reasonable [308] care have anticipated.

“Now the fact, if it be a fact, that the manufacturer does not intend that his product shall be used in a certain way will not relieve him from liability for damages to one attempting to so use it, if the manufacturer, as an ordinarily prudent person, had reason to believe that it would be so used, and from the directions or instructions or information furnished by the manufacturer a person of ordinary intelligence would conclude that it might safely be so used.

“If you should find from the evidence that the roof primer when it was received by the plaintiff contained materials not called for by the defendant's formula which rendered the primer more flammable, explosive or dangerous, and the primer was in that respect defective, then the defendant would not be liable for injury and damage to property proximately resulting from such defective condition, unless it further appears by a fair preponder-

ance of the evidence that the defendant knew or, in the exercise of reasonable care, should have known of such defective condition; and in this connection you are instructed that it was the duty of the defendant to make only such inspection of the roof primer manufactured for it by its supplier as reasonable and ordinary care required, considering the nature and contents of the primer if made according to the formula and the uses for which it was sold and supplied. [309]

“There has been offered and received in evidence Defendant’s Exhibit No. 74, which is a general inventory and appraisal of the property of the Estate of H. N. Segerstrom, deceased. You will give the exhibit such weight and credit, considered in connection with all the other evidence in the case, as you feel that it is entitled to receive. In connection with the exhibit, however, you are instructed that the values placed upon property by estate appraisers, as shown on the exhibit, are not competent evidence of market value of the property in the present case and should not be so considered by you.

“Now the foreman and other employees of the plaintiff Segerstrom, when in the performance of their regularly assigned duties, were agents of the plaintiff in performing such acts, and any negligence of them or any of them was negligence of the plaintiff, and if such negligence was a contributing cause of damages to the plaintiff’s property, then the plaintiff cannot recover.

“In order for the plaintiff to recover against the

defendant, aside or apart from the Washington statute concerning which I have heretofore instructed you, he must show by a preponderance of the evidence that the defendant had knowledge of the danger, not merely a possible danger, but a probable danger that the material would be handled by the plaintiff in the way it was handled and that damage to [310] plaintiff's property would result, before the plaintiff is entitled to recover. If you find that the defendant could not reasonably anticipate such probable danger, then your verdict should be for the defendant.

“Where an article is not inherently dangerous, but becomes dangerous only because of some act of the plaintiff, then the defendant is not liable to the plaintiff for the consequences which might result therefrom, aside from the state statute concerning which I have heretofore instructed you.

“You are instructed that, generally speaking, all persons must exercise reasonable care for their own safety. Therefore, if you find from the evidence that there was a danger in placing the Battleship over an open flame in an enclosed room, and that plaintiff's employees in performance of their assigned duties appreciated or, in the exercise of reasonable care, should have appreciated such danger, then the defendant was not required to give warning of the danger.

“A manufacturer is not bound to anticipate that a product will be used other than in the manner intended, and if, considering the liability of defendant, aside from the Washington state statute pre-

viously mentioned, you find from the evidence that a reasonably prudent person would not under the circumstances place the material referred to in [311] the complaint on an open fire and within a room such as the room described by plaintiff's witnesses, then you should find for the defendant on the issue of such liability.

"If, on the issue of liability of the defendant, aside from the Washington state statute previously mentioned, you find from a preponderance of the evidence that the Battleship product sold to the plaintiff was a standard and common commodity and that there is no inherent danger in the product as manufactured which the defendant knew or ought to have known would probably produce the injury complained of and in the manner in which it was received, when handled by a person of ordinary knowledge and prudence, then your finding on that issue should be for the defendant.

"Now if, on the issue of liability of defendant, aside from the state statute previously mentioned, you find from the evidence that the Battleship primer became dangerous in this case only because of being heated in the manner in which it was heated, and that the plaintiff had been adequately warned against heating Battleship primer, then your finding on that issue should be for the defendant.

"You are instructed that it was the duty of the plaintiff, John Norman Segerstrom, to read the instruction book furnished him by the defendant and to follow the instructions as they would be

understood and construed by an ordinarily prudent person and to pass the information on to [312] the employees charged with using the Battleship product. If you find from the evidence that his failure to do so was a contributing cause of the fire and ensuing damage to his property, then your verdict should be for the defendant.

“Now, members of the jury, you are the sole judges of what is the evidence in this case and of the credibility and the weight which is to be given to the testimony of the different witnesses who have testified in this trial.

“In weighing the testimony of a witness, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor, any party? Did he appear to be fair and candid, or otherwise? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

“Now a witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If the jurors believe that any [313] witness has

been thus impeached and discredited, it is their exclusive province to give the testimony of that witness such credit, if any, as they think it may deserve. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of a witness in the trial and in a deposition given before the trial, or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. You should bear in mind that two or more persons witnessing an incident or transaction may see it differently, and innocent misrecollection, like failure to recollect, is not an uncommon experience.

“In weighing the effect of any discrepancy, the jury should consider whether it pertains to a matter of importance or an important detail and whether the discrepancy results from innocent error or willful falsehood. You should be slow to conclude that any witness has willfully testified falsely as to any material matter; but if you do so conclude, you are at liberty to discredit the entire testimony of such witness, except insofar as it may be corroborated by other credible evidence in the case.

“An expert is an individual who, by education, study, training, experience, or observation or combination of these factors, has acquired special knowledge, skill or understanding in a particular subject beyond that of the average person. When witnesses qualify as experts in a [314] particular field and are allowed to express opinions rather than testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invad-

ing its functions. The responsibility to decide rests upon the jury. It is your duty to evaluate and appraise the testimony of a witness who expresses opinions precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. The rules for determining the credibility of witnesses which I have given you in these instructions apply to expert witnesses as well as to other witnesses.

* * * * *

(Instructions were given pertaining to measure of damages.) (T1672-1676)

"The fact that the Court has instructed you upon the rule governing the measure of damages is not to be taken by you as an indication on the part of this Court, either that it believes or does not believe, that the plaintiff is entitled to recover damages. Such instructions are given to guide you in the amount of your verdict, if you find that the plaintiff is entitled to recover damages against the defendant.

"Now from time to time, the attorney for one or the other of the parties has interposed objection to evidence. Counsel not only have the right, but the duty, to [315] make any and all objections which are deemed advisable or appropriate, and no inference or presumption should be indulged in one way or the other by reason of the making of such objections.

"At times throughout the trial, I have been called upon to pass on the question of whether certain offered evidence should be admitted. You are not

to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law with which the jury is not concerned. As to any offer of evidence that was rejected, you should not consider the same, and as to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or the reason for the objection.

“If I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or defendant in this case, you are instructed to entirely disregard the suggestion. I have tried to be strictly impartial, and if any action or expression of mine has seemed to indicate the contrary, you are instructed to disregard it. If I have made any comment on the evidence or regarding the facts in this case, either in these instructions or otherwise, in the course of the trial, you may consider, but you are not bound by such [316] comment. It is your duty to follow my instructions as to the law, but finding the facts, as I have told you, is your sole function and responsibility.

“Now in your deliberations, there is no room for sympathy, sentiment, prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, and to decide the issues upon the merits.

“Now when you retire to the jury room to con-

sider your verdict, you will take with you the exhibits which have been admitted in evidence in the case and a list of the exhibits which has been prepared by the Clerk for your convenience. I think you will find this list helpful, as there are 80 exhibits here. The list sets them out in chronological, numerical order, beginning with 1 and ending with 80. I think you will find it helpful if you wish to refer to a particular exhibit in your deliberations. And you will also take with you blank forms of verdict which have been prepared for your convenience, and the blanks are so simple I will not need to spend much time on them. They have what we call the heading of the case, and then one verdict: 'We, the jury in the above-entitled case, find for the plaintiff in the sum of \$.....;' the other form: 'We, the jury in the above-entitled case, find for the defendant.' You select the appropriate form, fill in the amount that [317] you find, if your verdict is for the plaintiff, and then have your foreman sign it and let the bailiff know that you are ready to return it into court.

"You will, of course, elect one of your members as foreman to begin with. The foreman, it will be his duty to preside over your deliberations on your verdict and to represent you as your spokesman in the further conduct of the case.

"Now it will be necessary for all of you to agree to return a verdict; in other words, your verdict must be unanimous. And when you have agreed upon a verdict unanimously and your foreman has

signed it, you will then be returned in the presence of the Court and the attorneys for the parties.”

* * * * *

In the absence of the jury, plaintiff excepted to instructions. (T1680-1688)

Defendant's Exceptions (T1688-1698)

“Mr. Lowe: Fortunately, in most instances, the Court gave the instructions as they were requested so they are not too difficult to follow. I have had the unfortunate experience in the Federal Court of the Court giving instructions without even having them written out before, and they are difficult then.

“The Court: Yes, that makes it very difficult.

“Mr. Lowe: The defendant except to that portion of the instructions given as follows:

‘You are instructed that, aside from any requirements of statutes, a manufacturer who puts up and sells a material which is inherently dangerous has a positive duty to give adequate warning of its dangerous character to the purchaser of such material, and the failure of such manufacturer to give such adequate warning is negligence rendering the manufacturer liable for any damages proximately resulting from such failure to warn;’ for the reason that the material involved in this case, under the evidence, is not inherently dangerous, but becomes dangerous only when used in a way not intended by the manufacturer.

“The defendant further excepts to that portion of the instructions which are, in substance:

‘You are therefore instructed that if you should

find from a preponderance of the evidence that the material sold by defendant to plaintiff was inherently dangerous, and that defendant failed to warn plaintiff of such danger as to the material, and the fire damage to plaintiff's property proximately resulted from such failure to warn, if any, then your verdict should be for [319] the plaintiff, unless you find further from the preponderance of the evidence that the plaintiff was guilty of contributory negligence.'

This exception is taken for the reason that it is the theory of the defendant, and the evidence establishes, that the material in question was not inherently dangerous and was dangerous only if improperly used or improperly treated.

"The defendant excepts to the instructions submitting to the jury the Revised Code of Washington 70.74.300, in which the jury is instructed:

'You are instructed that there is a statute of the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:

"A person who puts up for sale or who delivers to a warehouseman, dock, depot or common carrier, a package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, power or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word 'explosive,' shall be guilty of a misdemeanor."

'You are instructed that a violation of the foregoing statute would constitute negligence.'

The defendant excepts to this instruction for the

reason that the statute is intended to, and does, apply only to the items mentioned when they are in an unadulterated condition; for the further reason that the statute is no longer in effect; there is a later statute covering the handling of explosives [320] and defines explosives; and the substance here in question is not within the statutory definition of explosives contained—I have forgotten, we cited it to your Honor this morning or yesterday, I believe, the later explosive statute.

“The Court: The Laws of 1931?

“Mr. Graves: Chapter 111 of the Laws of 1931.

“Mr. Lowe: Yes, Chapter 111 of the Laws of 1931.

“The Court: I might say, to positively identify this instruction, it is one of the few that I gave without change, it is Plaintiff’s Requested Instruction No. 2.

“Mr. Lowe: Plaintiff’s No. 2, yes.

“We further except to the instruction given to the jury as to the application of the statute in question, namely, the Revised Code of Washington 70.74.300, reading:

‘If you should find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to the plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by that statute;’ for the reason

that, as given above, this statute applies [321] only to the named articles when they are in their unadulterated condition; that the Laws of 1931 define explosives and govern the handling of the explosives, and this material does not come within either the definition nor does the statute here properly apply to the sale of roofing primer intended for application to an exterior surface of a building.

“The defendant excepts to that portion of the instructions in which the Court instructed the jury, in effect, that there has been some reference to the regulations of the Interstate Commerce Commission during the evidence and you are instructed that the regulations of the Interstate Commerce Commission as to the labeling of flammable materials are concerned with the hazards connected with the shipment of such materials in closed containers; therefore, you should wholly disregard anything which you may have heard concerning the Interstate Commerce Commission regulations.

“This, of course, withdraws from the jury any consideration of those regulations, when, as a matter of fact, there is evidence that such regulations are recognized in the industry as being the measure of diligence or measure of care to be exercised by manufacturers in labeling their products, whether they are actually for use or transportation in interstate commerce or not, and there is evidence that they are the only known published regulations having to do with labeling of materials of the nature of this primer. [322]

“The Court: I didn't give it in just the way that

it was proposed, but your statement sufficiently identifies it. It was Plaintiff's Requested Instruction No. 4.

"Mr. Lowe: Yes, I recognize there was some slight change in phraseology.

"The Court: Your reason, however, goes to the instruction that I gave.

"Mr. Lowe: Goes to the instruction as given, yes.

"The Court: Yes.

"Mr. Lowe: I believe that is all. I thank you.

"Mr. Graves: May I just make a further suggestion, Mr. Lowe?

"The Court: Yes, all right.

I suppose that your definite exception to Plaintiff's Proposed Instruction No. 2 would be sufficient to include it, but I presume you wish the record to show an exception to my having made an exception to those proposed instructions of those which I gave, I gave a number of those, where I made the exception that 'except for this statute?'

"Mr. Lowe: Mr. Graves just called my attention to that.

"Defendant further excepts to any reference in the instructions including in the definition of negligence or with reference to negligence the statutory prohibition contained in Remington's Revised Statute 70.74.300, and [323] excepts to the statutory reference in the instructions regarding negligence in sending out or selling or giving to the plaintiff material of an inherently dangerous character, for the reason that the evidence here establishes that

this material is not inherently dangerous, in any event, unless improperly used, and it is not inherently dangerous if used as expected to be used, namely, on the outdoor roof of a building.

“Mr. Graves: There is one point that I would like to discuss with your Honor briefly, and I have not been able to follow the instructions as carefully as I should like to.

“The gist of the instruction to which I wish to refer is to this general effect: the fact that the manufacturer does not intend to have his product used in a certain way is no defense if he should have anticipated that it would have been used in that manner. Now that is not an exact quotation, your Honor, but I think that is the gist of the instruction.

“The matter that I would like to point out there is this: There is evidence, and I think undoubtedly your Honor had in mind the heating of the primer over the fire.

“The Court: Yes.

“Mr. Graves: What I have in mind is that the instructions, or this instruction, is broad enough to permit the jury to draw the inference that—well, let me go back. [324]

“There are two elements that I think the plaintiff must prove: (1) that the primer, as they said in the pretrial conference, constituted a trap because it was so viscous that it could not be applied unless it was heated, and that from that we must have anticipated it would be heated. Now the fact is that there is evidence in the record which would

indicate that the primer is not viscous unless it is chilled, and the jury might very well draw the inference that this instruction applies to the purchaser placing the product in a cold storage warehouse and keeping it there until they were ready to apply it. In other words, the instruction is broad enough in its context to refer both to the chilling of the product by the purchaser, as well as to the subsequent heating of the product by the purchaser.

“Do I make myself clear to the Court in that respect?

“The Court: I am not sure that I follow you, no.

“Mr. Graves: Well, the instruction is the fact it is used in a certain way is no defense if the manufacturer should have anticipated that use. Now I apprehend that the jury may deem that the chilling of this product by placing it in cold storage is a use that the manufacturer did not apprehend and yet is excused by this instruction, and I don't think that was the intention of the Court. At least——

“The Court: No, I didn't have that in mind.

“Mr. Graves: It is my feeling that there were two uses here that the manufacturer could not anticipate: first, placing it in the cold storage and chilling it and then placing it over a fire to relieve that chill, and that the instruction intends to relate only to the subsequent improper usage.

“The Court: I think the one that you refer to is Plaintiff's No. 8, which I modified somewhat as I gave it. It is:

‘You are instructed that the fact, if it be a fact, that the manufacturer does not intend that his product shall be used in a certain way will not relieve him from liability for damages to one attempting to so use it if the manufacturer, as an ordinarily prudent person, had reason to believe that it would be so used, and from directions or instructions or information furnished by the manufacturer a person of ordinary intelligence would conclude that it might safely be so used.’

I know of no directions or instructions or information in evidence in this case that the product may be put in cold storage. There is evidence on the other points here, that is, from the standpoint of the plaintiff in their argument that this doesn’t apply to the primer, and so on. They [326] argue, of course, or contend that a person could conclude from the pamphlet furnished here that they can safely heat it. This qualifying language that I put in, I think, would keep the jury, if they follow the evidence, from concluding that that was intended to refer to putting it in cold storage.

“Mr. Graves: Well, I am not entirely clear, frankly. I would like to take an exception to that.

“The Court: Yes, all right, you may take an exception.

“Mr. Graves: That the instruction is broad enough to refer both to the placing of the primer in cold storage and retaining it in cold storage until the time that it was used, and, since it is subject to interpretation and the further interpretation that thereafter, to relieve the primer of the chill so con-

tracted, it would be proper to place it upon a fire, that is a use that no manufacturer could have anticipated and, therefore, should not have been given to the jury.

“I state that with some deference, your Honor, but it did seem to me it was broad enough to cover those two situations.

“The Court: All right. You may bring in the jury.

“I might say that one thing that might make counsel a little less concerned is the practice in Federal Court of not to send these typed instructions to the jury, so that it [327] is always problematical how many they really remember, anyway.

“Mr. Graves: I think we sometimes assume memory on the part of the jury that we may not be able to exercise ourselves.”

* * * * *

(The cause was submitted to the jury at 6:25 p.m., this date, May 7, 1954.) [328]

RULING ON MOTIONS

Be It Remembered That the above-entitled cause came on for hearing before the Honorable Sam M. Driver, Judge of the said Court, at Spokane, Washington, on May 28, 1954, on plaintiff's motion for a partial new trial and defendant's motion for judgment notwithstanding the verdict or for partial new trial; counsel being present as during the trial of the said cause, except that Ben H. Kizer appeared and made argument on behalf of defendant's motion.

(After hearing argument by counsel for the respective parties, the Court made the following oral rulings on the motions.) (T1701-1705)

“The Court: Well, if that is all the argument, I will try to briefly state my conclusions here, and I can do so by adopting, in part, the argument of counsel on both sides, as I need not repeat it or attempt to summarize it at length.

“I might say, however, that this case was one [329] which presented, to me, unusual difficulties. I think at one moment in the trial I remarked, in the absence of the jury, that the case simply bristled with difficulties.

“This statute gave me a great deal of trouble. I was first inclined to think that it didn’t apply, and it seemed to me a strange thing that we should have this statute that, while the evidence isn’t too clear about it, it seemed to me had been observed in the breach. For the most part, it obviously was not being enforced as to products similar to the ones involved in the suit.

“But, after exhaustive argument and mature consideration, I came to the conclusion that, under the evidence here, it was proper for me to submit it to the jury for the jury to determine whether or not the roof primer was a material substantially similar, substantially the same kind and equally as dangerous, as the naphtha or gasoline specifically mentioned in the statute; and I am in accord with Mr. Williams’ statement that there was evidence, at least, that this was a mechanical mixture, rather than a chemical compound, and that it was equally

or about as volatile and explosive and combustible as gasoline and more combustible and more dangerous than many grades of naphtha.

“And if I had it to do over again—of course, hindsight is always better than foresight or one’s judgment during the heat and rush of a jury trial—I would have [330] instructed that the jury must find that the roof primer was of substantially similar character to the naphtha or gasoline specifically mentioned, but that was the basis on which the case was argued and, if there had been any argument to the contrary, that any combustible material would have to be labeled regardless of whether it were similar to or equally as dangerous as naphtha or gasoline mentioned in the statute, I certainly would have instructed the jury, but I didn’t do so because the question didn’t seem to be raised or the jury misled as to the application of the statute.

“It is a close question and one concerning which I still have doubts, but, having resolved it and submitted the case to the jury on the basis of it, I don’t think I should change my conclusion at this time regarding the applicability of the statute.

“Now on the question of the motion for partial new trial on the question of damages, the jury’s verdict was low, perhaps lower than I should have found if I had had the responsibility of finding the amount of damages, I don’t know. I prefer not to draw conclusions of that kind when I haven’t the responsibility. I do think that there isn’t anything here to indicate that the jury was influenced by

prejudice and passion, and there is nothing here, it seems to me, to show that the jury went beyond the undisputed evidence in finding the amount which they did in their verdict. [331]

“While it is true that under the Federal practice, and apparently under the Washington State practice, as well, that in a proper case a new trial may be granted on separate issues, I have the feeling that that sort of relief should be sparingly granted, because you just can’t, it seems to me, in fairness, divide jury verdicts up into compartments and treat them like a problem in logic, because jurors are not required to be, and, as a rule, are not logical, and it seems to me that one who elects to have a jury trial should take the bitter with the sweet, the disadvantages as well as the advantages of a jury determination.

“And, while it may be, as Mr. Williams argued here, I am not inclined to dispute that, that there was a separate finding here, that the jury first found liability and then went on to the question of the amount of damages, it is awfully hard to segregate the influences of the two with a jury where the jury is called upon to pass on the two questions, and I have the definite impression, while I don’t say it as a matter of fact, I have the definite impression that, to say the least, it is extremely doubtful to me in my mind, that the plaintiff would have recovered at all in this case if it hadn’t been for the statute which was submitted to the jury. And it is pretty hard to say that some of these jurors, who would not have found for the plaintiff had

it not been for the statute, were not to some degree influenced as to the [332] amount as to the matter of damages.

“So that if you give a partial verdict, unless it is a clear-cut case, it seems to me it is somewhat unfair to the other party, and I am inclined to think if there should be a new trial, it should be a new trial on both the issue of liability and on the issue of damages, and neither side seems to favor that sort of treatment.

“Now that may be a rather practical way to look at things, but I have in mind that some of our eminent authorities on procedure, such as Professor Moore, who is the author of perhaps one of the best known works on Federal Procedure, in his defense of the jury system and general verdicts, says frankly that the jury verdict, particularly the general verdict, is the answer of the man in the street to judicial controversies; that you can't pin point it and say that it is an answer according to the law as embodied in the court's instructions and the facts as submitted; it is over-all rough justice, the answer of the man in the street, and, as Professor Moore says, ‘earthy justice’ that the jury dispenses.

“Now this is ‘earthy justice,’ and I just have the feeling that I wouldn't be justified in giving a partial retrial to either side here under the circumstances, so that I think the ruling of the Court will be that all of the motions will be denied.”

[Endorsed]: Filed September 8, 1954.

[Endorsed]: No. 14521. United States Court of Appeals for the Ninth Circuit. Panther Oil & Grease Manufacturing Company, a corporation, Appellant, vs. John Norman Segerstrom, as administrator of the Estate of H. N. Segerstrom, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: September 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14521

JOHN NORMAN SEGERSTROM, as Adminis-
trator of the Estate of H. N. Segerstrom, De-
ceased, Plaintiff-Appellee.

vs.

PANTHER OIL & GREASE MANUFACTUR-
ING COMPANY a Texas Corporation,
Defendant-Appellant.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

1. The testimony by Mr. McGivern, giving his opinion as to why manufacturer's labeled products, having a flash point of 150° or less is hearsay,

speculative, not a subject of expert testimony and not admissible.

2. The respondent was adequately warned that the product furnished him by the appellant should not be heated.

3. The proximate cause of plaintiff's damage was the unanticipated conduct of plaintiff in placing the product over an open flame.

4. The respondent, through his employees, was aware of the danger of heating the product and was, therefore, negligent as a matter of law and assumed the hazards in heating.

5. The construction and application of the Revised Code of Washington, Section 70.74.300 was for the Court to determine and should not have been left to the jury.

6. The Washington Statute RCW 70.74.300 does not intend to and does not apply to a commercial product such as the roof coating in question.

Dated this 14th day of September, 1954.

PAINE, LOWE, COFFIN, ENNIS
& HERMAN,

/s/ R. E. LOWE

GRAVES, KIZER & GRAVES,

/s/ PAUL H. GRAVES,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed September 20, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION TO CONSIDER ORIGINAL
EXHIBITS

It is stipulated between the parties that the court may consider the original exhibits without the same being incorporated into the printed record, except insofar as excerpts are incorporated into the narrative statement of testimony.

Dated this 14th day of September, 1954.

GRAVES, KIZER & GRAVES,
/s/ PAUL H. GRAVES
PAINE, LOWE, COFFIN, ENNIS
& HERMAN,
/s/ R. E. LOWE,
Attorneys for Appellant

CASHATT & WILLIAMS,
/s/ JEROME WILLIAMS,
Attorneys for Appellee

[Endorsed]: Filed September 20, 1954. Paul P. O'Brien, Clerk.